TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 291

MARION B. KOTCH, JOHN L. RICHARDS, ADOLPH CLARK, ET AL., APPELLANTS,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED JULY 12, 1946.

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF LOUISIANA

No. 37,809

MARION B. KOTCH, ET AL.

v.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

PETITION FOR APPEAL—Filed June 6, 1946

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Louisiana in the above cause, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, plaintiffs and appellants herein, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon. There is annexed hereto a separate Statement as to Jurisdiction and Assignment of Errors.

Respectfully submitted, John D. M. A., Edwin H. Grace, 1401 Hibernia Bank Building, New Orleans, Louisiana; C. A. O'Niell, Jr., 2104 American Bank Building, New Orleans, Louisiana, Attorneys for Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, Appellants.

June 6th, 1946.

[fol. 2] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER ALLOWING APPEAL

On this 6th day of June, 1946, on reading the petition of Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, the appellants herein, praying

for the issuance of an order herein, allowing their appeal to the Supreme Court of the United States from the Supreme Court of the State of Louisiana, and it appearing from said petition and the record of the above entitled cause that there was drawn into question the validity of Act 5[illegible] of 1908, as amended by Act 134 of 1942, on the ground that the said statute violates the Fourteenth Amendment of the Constitution of the United States, and that the decision of this court was in favor of the validity of the said statute, and that such petition is a proper petition for the issuance of this order,

Now, therefore, it is ordered by the undersigned, the presiding judge of the Supreme Court of the State of Louisiana in this cause, the Chief Justice of said court being recused herein, that said appeal be, and the same is hereby, allowed; and,

It is further ordered that the appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, execute to the respondents their bond with surety [fols. 3-14] to be approved by the undersigned in the sum of $500.00 in condition according to law.

It is further ordered that the Clerk of this court within forty days from this date, make and transmit to the Clerk of the United States Supreme Court, under his hand and the seal of this court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be transmitted by praecipe filed with him by any of the parties hereto.

Thus done and signed at New Orleans, Louisiana, on this 6th day of June, 1946.

Wynne G. Rogers, Associate Justice, presiding in this cause in the absence of the Chief Justice, who is recused.

[fol. 15] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS

Now come the appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, and

file herewith their petition of appeal and say that there are errors in the record and proceedings of the above case; and, for the purpose of having the same reviewed in the United States Supreme Court, make the following assignment:

1

The Supreme Court of Louisiana erred in declaring and decreeing that Act 54 of 1908, as amended by Act 134 of 1942, is not unconstitutional and void and in violation of the Fourteenth Amendment of the United States Constitution, and particularly the equal protection clause of the Fourteenth Amendment.

2

Act 54 of 1908, as amended by Act 134 of 1942, gives to the pilots commissioned thereunder the power of controlling all appointments and of preventing all except those of the pilots' selection from being appointed. It was conceded by the Supreme Court of Louisiana in its opinion in this cause that the act conferred such power upon commissioned pilots but the court proceeded to hold the statute valid as a proper exercise of police power, which was erroneous.

[fol. 16]

3

The Supreme Court of Louisiana based its decision in this case upon Olsen v. Smith, 195 U. S. 332, 48 La. Ed. 224, 25 S. C. 52. That case does not support Act 54 of 1908, as amended, and the court erred in so holding.

4

The court erred in sustaining the exception to the petition, as the petition showed Act 134 of 1942, is unconstitutional and the exercise of authority thereunder is in violation of appellants' right under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted, John D. M. A. & Edwin H. Grace, 1401 Hibernia Bank Building, New Orleans, Louisiana; C. A. O'Niell, Jr., 2104 American Bank Building, New Orleans, Louisiana, Attorneys for Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, Appellants.

[fol. 17] SUPREME COURT OF LOUISIANA

No. 37,809

MARION B. KOTCH, et al.,

v.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, et al.

Appeal from the Civil District Court for the Parish of Orleans; Rene Viosca, Judge.

Hawthorne, J. takes no part, O'Niell, C. J. recused.

OPINION—February 11, 1946

ROGERS, Justice.

Plaintiffs hold first class pilot licenses from the United States Government and are experienced pilots on the Mississippi River and other waters. They brought this suit against the Board of River Port Pilot Commissioners for the Port of New Orleans and the individual members thereof to have Act 54 of 1908, as amended by Act 134 of 1942, under which the defendant Board was created and is operating, declared to be unconstitutional and to have its enforcement enjoined; or, in the alternative, to have the amendatory act declared to be unconstitutional and to have its enforcement enjoined. In the further alternative, plaintiffs pray if Act 54 of 1908 and its amendment be held to be valid, that the defendants be ordered by mandamus to examine them on their qualifications as pilots and, finally, to certify them to the Governor for appointment. Defendants filed an exception of no cause of action, which was sustained and the suit dimissed. Plaintiffs have appealed from the judgment.

In 1908 the Legislature passed an act regulating the system of river port pilotage for the Port of New Orleans, providing for a board of river port pilot commissioners, [fol. 19] defining its duties, prescribing the necessary qualifications for port pilots and fixing their charges. Act 54 of 1908.

Section 1 of the act creates the Board of River Port Pilot Commissioners for the Port of New Orleans to consist of three citizens to be appointed by the Governor with the consent and advice of the Senate. Sections 2 and 3 provide for

the appointment and commissioning by the Governor of twenty-eight pilots from those pilots who were actively and continuously engaged for one year previous to the passage of the act in piloting sea-going vessels from the head of the Passes to the Port of New Orleans and return. Section 4 declares that whenever there exists a necessity for more pilots, the Board of River Port Pilot Commissioners shall hold examinations of applicants for appointment under such rules and regulations and with such requirements as they shall have provided, with the approval of the Governor; provided no applicant shall be considered by the Board unless he submits proper evidence of moral character, is a voter of the State, and shall have served six months apprenticeship in his proposed calling. Section 4 further provides, upon the certificate of the Board to the Governor that the applicant has complied with the provisions of the act, the Governor may in his discretion appoint to existing vacancies.

Act 134 of 1942 amends Act 54 of 1908 by providing it shall be the duty of the body of pilots known as "River Port Pilots" to pilot sea-going vessels from Pilot Town to Southport and return and within the port of New Orleans, and providing further that the river port pilots shall be entitled to the exclusive right to pilot vessels within the Port of New Orleans between Southport and Mereauxville.

Plaintiffs' petition alleges, in substance, that Act 54 of 1908, on its face, is violative of the Fourteenth Amendment of the Federal Constitution and of Section 2 of Article 1 [fol. 19] of the State Constitution. The petition further alleges that the legislative act does not contain any provision for competent examinations and also fails to lay down any rules for the Board to follow in the commissioning of pilots, but, on the contrary, the act vests in the Board arbitrary powers in that connection. That the Board has always assumed and exercised arbitrary authority in respect to the commissioning of pilots; that no examinations have ever been held by the Board; that appointments have always been made on a personal basis—the appointee being first "elected" by vote of the members of the Port Pilots Association, an organization composed exclusively of commissioned river pilots; that the three members composing the Board are members of the Crescent River Port Pilots Association, and in the vast majority of cases the appointees

have been kinsmen of one or more of the pilots, with no experience whatever as pilots prior to their election.

The petition further sets out the names of a number of pilots who were appointed in 1938 and 1944, the last time appointments were made, and also sets out their relationship to those pilots then holding commissions or to pilots formerly holding commissions; that thirty-four of the forty-one pilots presently holding commissions are related to other pilots or to their predecessors.

The petition alleges it is a matter of common knowledge that membership as a commissioned pilot is closed to all persons except those favored by the pilots: that nevertheless four of the petitioners, whose names are mentioned at various times, made formal application to the defendant Board to be considered as applicants for examination as pilots and that their applications have been ignored. That being barred by the provisions of Act 54 of 1908 from piloting vessels in foreign trade on the Mississippi River below the limits of the Port of New Orleans, petitioners in the past have largely centered their activity to the Port itself, but that under the provisions of Act 134 of 1942, amending Act 54 of 1908, they are prohibited from piloting vessels [fol. 26] engaged in foreign trade within the Port and are placed in a position where they are not able to make a living since the coastwise business is not sufficient for their support.

The petition alleges that for the above reasons Act 54 of 1908 and its amendment, Act 134 of 1942, are unconstitutional, and that in addition thereto Act 134 of 1942 is unconstitutional because it is a local or special law which was not preceded by notice or publication as prescribed by Section 6 of Article 4 of the Constitution of 1921.

The contentions raised by the petition require this Court to determine whether Act 54 of 1908 and its amendatory Act 134 of 1942, on the face thereof are violative of the Federal and State Constitutions; whether if they are constitutional the acts have been rendered unconstitutional by the arbitrary, discriminatory and unjust way in which they have been administered by the defendant Board and, in the alternative, whether Act 134 of 1942 is a local or special law enacted without the constitutional requirement of notice or publication. In considering these contentions it should be kept in mind that under the exception of no cause of

action only the well pleaded facts and not the conclusions of law contained in the petition must be accepted as true.

Pilot regulations are regulations of commerce upon navigable waters. In Ex Parte McNiel, 13 Wall. 236, 20 L. Ed. 624, it was said by the Supreme Court of the United States: "It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; * * *. Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their [fol. 21] proper places and ready to perform the duties of their vocation. * * *"

It has long been settled by decisions of the Supreme Court of the United States that although state laws concerning pilotage are regulations of commerce they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject. Cooley v. Port Wardens, 12 How. 299, 13 L. Ed. 996; Ex Parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Olsen v. Smith, 195 U. S. 332, 49 L. Ed. 224, Anderson v. Pacific Coast Steamship Co., 225 S. W. 187, 56 L. Ed. 1047.

Since Congress has not acted to relieve vessels engaged in foreign trade from the provisions of state pilotage laws, the State has power to legislate concerning such pilotage.

Pilotage is not merely a business. It is a highly specialized and hazardous calling which, in the absence of action by Congress, is under the control of the State. By the adoption of Act 54 of 1908, as amended by Act 134 of 1942, the Legislature, in the protection of the public interest, has undertaken to regulate pilotage on the Mississippi River on vessels engaged in foreign trade from the Passes at the mouth of the river to Southport above New Orleans, which includes the pilotage of such vessels within the port itself.

Plaintiffs agree that the pilotage of vessels engaged in foreign trade is subject to state regulation, but they insist that such regulation must not be arbitrary or discriminatory, which they contend is the case with respect to the statutes in question. Plaintiffs' contention is based upon the Fourteenth Amendment to the Federal Constitution and Section 2 of Article 1 of the State Constitution. The argu-

ment is that the right of a person to render pilotage services is a fundamental right guaranteed by the constitutional provisions, and that therefore Act 54 of 1908, as amended [fol. 22] by Act 134 of 1942, providing for the commissioning of pilots and restricting the right to pilot to the duly commissioned pilots are violative of those provisions. But the argument in effect merely denies that pilotage is subject to governmental control and has been settled to the contrary by numerous decisions of the Supreme Court of the United States.

It is indisputable that the right to follow any of the ordinary occupations of life is one of the privileges of citizenship, and this includes the right to pursue any lawful occupation without statutory restrictions except such restrictions as may be applied to all persons pursuing the same occupation under the same conditions. But it is also indisputable that there are certain occupations in which the public has such interest as will make those occupations subject to statutory regulations, or even prohibition. The constitutional provisions on which plaintiffs rely were not designed to interfere with the public powers of the State; and within the limits stated by the Constitution, Federal and State, the Legislature is free to determine what subjects are proper to be legislated upon in the conservation of order, morals, health and safety. The cases relied on by plaintiffs, including the much cited case of Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, holding invalid a municipal ordinance which authorizes the issuing or withholding of a license to one engaged in a lawful business and which grants to an officer or set of officers the authority to determine the number of persons who shall engage in that business, have no application to a legislatve act which vests in a board of port commissioners the power to license and determine who shall render pilotage services and limiting the number thereof.

The argument that the statutes under review confer upon the commissioned pilots a monopoly of the business and permit them by a combination among themselves to exclude all other persons from rendering pilotage service is also [fol. 23] in effect a denial of the power of the State to regulate the business since, if the State has power to regulate and in so doing to name and commission those who are to perform pilotage service, it must follow that no monopoly or combination in a legal sense can arise from the fact that

the duly authorized agents of the State are alone allowed to perform the duties devolving upon them under the law.

The authorities support the legal propositions we have hereinabove referred to concerning the right of the State to control and regulate the business of pilotage within its territorial limits. Thus in People ex rel. Palmer v. Woodbury, 14 Cal. 43 a statute of California was sustained, which provided for a board of commissioners with power to appoint such number of pilots as they might deem necessary, not exceeding thirty. There it was left to the discretion of the board to determine the number of pilots, subject only to the provision fixing the maximum number of such pilots. In Caples v. McNaught, 147 Or. 72, 31 Pac. 2d 780, a legislative act was sustained which created a board of pilot commissioners and made it its duty, "to maintain a sufficient number of pilots upon the bar and river pilot ground to meet the demands of commerce * * *." In that case also the court upheld the right of the Legislature to confer upon the pilot commissioners the power to determine the number of pilots.

The leading and controlling case on the subject is Olsen v. Smith, 195 U. S. 332, 49 L. Ed. 224. There the Supreme Court of the United States announced the principles that should be applied in determining the constitutionality of legislative acts regulating pilotage. In that case, the constitutionality of an Act of the Legislature of the State of Texas regulating the business of pilotage was sustained. The Texas law, like the Louisiana law, provided that the Governor should appoint a board to which was granted the power of fixing charges, regulating the manner in which the pilots should perform their duty, examining them as to [fol. 24] their qualifications, hearing complaints against them and, if the occasion required, to suspend them until the Governor should act. The authority was conferred upon the Governor to appoint such number of branch pilots as might from time to time be necessary, each of whom should hold office for two years, subject to removal by the Governor at pleasure. Anyone who was not duly commissioned was prohibited from engaging in the business of pilotage so far as the statute provided for rendering of pilotage services by the duly appointed pilots. The only difference between the Texas law and the Louisiana law is that the Board of Pilot Commissioners under the Louisiana law is composed of three members, whereas the Texas board is composed of

five members. The nature of their powers and duties is substantially the same. The term of appointment under the Texas law is for two years. Under each statute, however the pilots so appointed are subject to removal by the Governor at pleasure. The Supreme Court of the United States, speaking through Mr. Justice White, later Chief Justice, and formerly a Justice of this Court, held that no inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed. And further, since the State, under its power to regulate, has the right to appoint and commission pilots, no monopoly or combination can arise from the fact that the authorized agents of the State are alone permitted to perform the duties with which they are charged under the law. After discussing these propositions, Justice White remarked as follows: "When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion,—which we do not at all imply is the case,—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it [fol. 25] has plenary power until Congress has seen fit to act in the premises." And so we may remark here, if the statutes in question are unwise the remedy lies with the Legislature in whom the ultimate authority on the subject is vested and not with the court to deny the right of the power of the State to exercise its authority over a matter wholly within its control.

Many authorities are cited on behalf of plaintiffs which announce or reaffirm sound principles of law, but we fail to find their application to the issues involved in this case. For example, it is argued that the doctrine for which plaintiffs contend is sustained by the case of State v. Board of Pilot Commissioners, 198 Wash. 695, 90 Pac. 2d 238. Counsel for plaintiff insists that this case is exactly in point. We can not agree. It is true in that case the Supreme Court of the State of Washington, by a divided Court, held that under the law of Washington the Board of Pilot Commissioners must hold examinations and issue certificates to those successfully passing the examination. But, as shown

by the opinion of the Court, that was because there was nothing in the statute specifically giving the Board the right to limit the number of pilots. Under the terms of the statute every person was given the right to take the examination and, if he successfully passed, to receive a certificate. In other words, the statute of Washington, which was involved in that case, did not limit the number of pilots, but merely created a board to hold examination and issue certificates. There was no limit placed upon the number of pilots and the mere possession of a certificate of proficiency entitled the holder to operate as a pilot. Under the statutes of this State the mere passing of an examination does not entitle the successful applicant to a commission as a pilot. The number of pilots is limited and the appointments are made by the Governor from the list of successful applicants only when the Governor is informed by the Board that the necessity exists for the creation of additional pilots. The difference between the law of Washington and the law of Louisi- [fol. 26] ana is clear. Under the law of Washington, the Governor does not appoint, but the commissioners are compelled to issue a certificate to anyone who successfully passes the required examination. Under the law of Louisiana, a person can only become a pilot when he has served an apprenticeship, has passed the examination, and has received a commission from the Governor.

In discussing the cases of Olsen v. Smith, Caples v. McNaught and Palmer v. Woodbury, the Supreme Court of Washington pointed out that those cases were distinguishable on the facts from the case which it was deciding and that also in those cases the Legislature of the respective states, either directly or by implication, conferred authority upon the board or individuals to limit the number of pilots whereas, the statute of Washington conferred no such power on the board either expressly or impliedly.

It is argued with great earnestness on behalf of plaintiffs that if the statutes in question are constitutional on their face, they are rendered unconstitutional by the arbitrary manner in which they are administered by the defendant Board of River Pilot Commissioners. In plaintiffs' petition it is alleged that the defendant Board has always assumed and exercised authority with respect to the commissioning of pilots; that no examinations have been held and that appointments have always been made on a personal basis, the appointee being first selected by the members of the

Crescent River Port Pilots Association, an organization composed exclusively of commissioned river pilots and of which the three defendant commissioners are members; that in a vast majority of cases, the appointees have been kinsmen of one or more of the pilots with no pilotage experience whatever prior to their selection; and that it is a matter of common knowledge membership as a commissioned pilot is closed to all except those having the favor of the pilots.

[fol, 27] Generally speaking, the constitutionality of a statute must be determined not by what is done, but what it authorizes to be done under its provisions. Thus in Ward v. Leche, 189 La. 113, 179 So. 52, this Court recognized and followed the principle of constitutional law that courts can not annul or pronounce void any act of the Legislature on any other ground than that of repugnancy to the Constitution.

The fact that power is particularly given and may be abused by incompetent or unscrupulous officials chosen to administer it does not justify the argument that the power itself can not be constitutionally exercised, for it is only because of the existence of the power that makes possible its abuse.

The allegations of the petition to which we have referred are, in their essence, that the Crescent River Port Pilots Association controls the commissioning of pilots. But there is a clear distinction existing between the Board of River Pilot Commissioners and the River Pilots Association. The Board of Commissioners is composed of pilots commissioned by the Governor as officers of the State. The Pilots Association is a private corporation organized under the general corporation laws of the State. The Legislature, in adopting Act 54 of 1908, recognized the need for an association of pilots and so provided. Section 6 of the Act provides: "That said River Port Pilots may form themselves into an association or associations, as to them may seem fit, not in conflict with law or the rules and regulations of the River Port Pilot Commissioners."

As was pointed out by the Supreme Court of the United States in Ex Parte McNeil, 13 Wall. 236, 20 L. Ed. 624, the service in which pilots are engaged is one of great importance, frequently full of hardship and sometimes of peril and, regardless of time and weather conditions, they must be in their places ready to perform the duties of their vocation. Pilots must board ships, and there must be a

pilot boat ready at all times to take the pilot to and from [fol. 28] the ships. Pilot stations, crews to operate the pilot boats, and pilots to care for vessels which arrive at irregular intervals must be constantly maintained to promptly furnish the needed service. If, in view of these considerations, the Legislature concluded that an association of pilots rather than pilots operating singly and alone would best serve the purpose of commerce and navigation, it is not for the Courts to question the wisdom of the Legislature in enacting the legislation authorizing the creation of the River Port Pilots Association and limiting the membership thereof. There is nothing in the law which requires the Crescent River Port Pilots Association to admit to membership persons not of their selection. If an apprenticeship must be served under pilots who are members of the association, because as a practical matter it may not be served otherwise, there is nothing in the law which forbids this situation to arise.

It is argued that the Board of River Port Pilots dictates the appointment of pilots but, when tested by the terms of the statute itself, the argument must fall. The only power conferred by the statute upon the Board of Pilot Commissioners is the power, when the necessity exists for additional pilots, to hold examinations under such rules and regulations and with such requirements as they may provide, with the Governor's approval. In holding these examinations, the Board is limited to applicants who submit proper evidence of their moral character, are voters of the State, and have served six months apprenticeship in their proposed calling. Upon the certificate of the Board to the Governor that the applicants have complied with the provisions of the act, the Governor may, in his discretion, appoint to existing vacancies. The Board of Commissioners has nothing to do with the selection of apprentices. Plaintiffs' charge that only a favored few may become apprentices is a charge levelled against the Pilots Association and has no relation whatsoever to any action of the Board. The [fol. 29] statute does not provide for the appointment of those making the highest grades. It merely provides that the applicant shall have served an apprenticeship of six months and have passed the examination prescribed by the Board of Commissioners. The right to make the appointment is conferred upon the Governor and plaintiffs cannot be heard to complain because the Governor in exercising

his authority appoints some persons who are closely related to other pilots instead of ignoring such relationship and appointing plaintiffs. The reasons which move the Governor to make the appointments are beyond judicial inquiry.

It is argued that Act 134 of 1942 is a special or local law, enacted by the Legislature without compliance with the provisions of Section 6 of Article 4 of the Constitution, requiring previous publication of notice of the intention to apply for its enactment. State v. Clement, 188 La. 923, 178 So. 493, is cited in support of the argument. But we do not understand that the cited case establishes a different rule from those cases which point out the distinction between a special law and a general law. The statute involved in that case restricted its application to swamp lands whose boundaries were within one hundred and fifty miles of the shore line of the Gulf of Mexico. It did not affect swamp lands located in other portions of the State. The court, after discussing the principles governing special laws and general laws, respectively, held that the classification of areas contained in the statute was wholly arbitrary and unreasonable and by reason thereof it became a special law within the constitutional provision, requiring publication, and not a general law.

The leading case of State v. Dalon, 35 La. Ann. 1144, contains a full discussion on the subject of special laws and general laws. In that case the legislative act organizing the Criminal District Court for the Parish of Orleans was involved. Dallon, who was convicted of arson, challenged the validity of his conviction on the ground that the creation [fol. 30] of the machinery of the Criminal District Court was a local or special law requiring publication, because it did not operate throughout the State and all of the parishes thereof. The Court, after characterizing the contention as preposterous and one that could not stand criticism, pointed out that: "The real distinction between public or general laws and local or special laws is, that the former affect the community as a whole, whether throughout the State or one of its subdivisions; and the latter affect private persons, private property or local private interests."

There are a number of decisions of this Court holding that a statute is not a special or local law merely because of the fact that the conditions under which it can operate prevail in only certain parts of the State. See State v. Donato, 127 La. 393, 53 So. 662, Shreveport v. Nojin, 140.

La. 785, 73 So. 996; State v. Nejin, 140 La. 793, 74 So. 103; State v. McCue, 141 La. 417, 75 So. 100; Clark v. Opelousas, 147 La. 1, 84 So. 433.

In State v. Donato, a liquor statute that was restricted to apply only to prohibition parishes, was held to be a general law notwithstanding the restriction. In that case this Court held: "A law general in its terms, applying to all persons * * *, is not a 'local law' * * * merely because the conditions under which it can operate prevail only in certain parts of the state."

The general rule is set forth in 59 Corpus Juris, at page 536, as follows: "A statute is not a local or special law, within the meaning of constitutional provisions requiring notice if persons or things throughout the State are affected, or if it operates on a subject in which the people at large are interested, even though its enforcement be restricted to a particular locality, or if an act is both general and special or private."

Pilots are State officers, created by the Legislature. The source of legislative authority is the police power of the [fol. 31] State. Its exercise is in the promotion of the general welfare. The fact that the Legislature deemed it necessary to regulate pilotage on the Mississippi River between Southport and Pilot Town, but did not find it necessary to regulate pilotage in other parts of the State does not make the regulatory statute a local or special law. The statute was adopted by the Legislature in the exercise of State sovereignty and the fact that the exercise of such sovereignty is not required for the regulation of pilotage throughout the State does not bring the law within the requirement of Section 6 of Article 4 of the Constitution. The test of whether a law is special or local is whether it operates only on a certain number of persons, within a class, but does not affect generally all persons within that class. The regulation by the Legislature of pilotage between Southport and Pilot Town without attempting to regulate it where such regulation is not needed is a matter solely for legislative determination. It would lead to an absurd result for the Legislature, in the exercise of the sovereign powers of the State, to prescribe regulations for pilots on every bayou and stream in the State. The congestion of shipping within the harbor of the Port of New Orleans and on the Mississippi River between Pilot

Town and the upper limits of the port is obviously the reason for the legislation. Its need grows out of the congestion of such shipping and the demands of interested parties for the protection of commerce by the regulation of pilotage. No argument is necessary to sustain the proposition, that the Legislature is not required to regulate pilotage where such regulation is not needed in order to regulate pilotage where such pilotage is needed.

Plaintiffs ask, in the alternative, that the defendant Board be ordered to examine them as to their qualifications as pilots and, finally, to certify them to the Governor for appointment as such. But, in so asking, plaintiffs fail to show the need for additional pilots and that they have [fols. 32-39] served an apprenticeship of six months as required by the statute. What plaintiffs are seeking, in the final analysis, is the right to become pilots upon the Mississippi River under the provisions of Act 54 of 1908, as amended, without showing compliance with the provisions of the statute. Plaintiffs, in effect, ask the court to compel the Governor to name them as pilots notwithstanding, when their demand is tested by the terms of the statute, no vacancy exists and notwithstanding plaintiffs do not possess the qualifications required by the act. Plaintiffs ask the court to do those things because they allege that the Crescent River Port Pilots Association, a private organization created under the terms of the act, selects its own apprentices, as it is authorized to do under the statute. But the Court can not comply with plaintiffs' request without creating in lieu of a constitutionally enacted statute a ruling of its own, based upon the alleged hardship arising out of the selection by the Crescent River Port Association of the apprentices who might thereafter become members of the organization. This the Court can not do. The justice or injustice of the statutory provision permitting the River Port Pilots Association to select apprentices is a question for the Legislature and not for the Court.

For the reasons assigned, the judgment appealed from is affirmed.

Rehearing Denied March 18, 1946.

[fol. 40] IN CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "D"

No. 257,881 Docket 5

MARION B. KOTCH, et al.,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, et al.

PETITION—Filed September 11, 1944

To the Honorables, the Judges of the Civil District Court for the Parish of Orleans, State of Louisiana:

The petition of Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, all of full age of majority and residents of the Parish of Orleans, with respect, represents:

1

That your petitioners are licensed river pilots, holding first class pilot licenses from the United States Government; and that your petitioners are experienced and well qualified, having been actively engaged as pilots—on the Mississippi River and other waters, but especially on the Mississippi—for more than 15 years; and that your petitioners are qualified voters of this state.

[fol. 41] 2

That Act 54 of 1908, as amended by Act 148 of 1914 and by Act 9 of 1918 and by Act 134 of 1942, which undertakes to regulate pilotage of the Mississippi River, is unconstitutional, null and void, for the reasons hereinafter stated.

3

That the said Act 154 of 1908 provided for the appointment of a board known as the Board of River Port Pilot Commissioners for the Port of New Orleans, and provided for the commissioning of 28 pilots to "be appointed by the

governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels from the head of the passes to the port of New Orleans and return"; and the said act further declared "whenever there exists a necessity for more pilots among the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations" of applicants for appointment.

4

That Act 54 of 1908, in terms, gave the pilots commissioned thereunder the exclusive right of piloting vessels in foreign trade from the passes *to* the port of New Orleans. Act 134 of 1942 amended the said act by extending their exclusive jurisdiction to include the port itself, declaring "that said river port pilots shall be entitled to the exclusive right to pilot vessels within the port of New Orleans between Southport and Mereauville, Louisiana."

5

Your petitioners show that Act 54 of 1908, on its face, is unconstitutional, violating the fourteenth amendment of the United States Constitution and, as well, Section 2 of Article 1 of the Constitution of 1921 of the State of Louisiana. The Act contains no provision for competi-ve examinations and lays down no rules for the board to follow in the commissioning of pilots but on the contrary the act vests in the board arbitrary powers in that connection.

[fol. 42]

6

That, in fact, the defendant board has always assumed and exercised authority in respect to the commissioning of pilots. No examinations have ever been held by the defendant board. Appointments have always been made on a personal basis,—the appointee being first "elected by vote of the members of the Crescent River Port Pilots Association, an organization composed exclusively of commissioned river pilots. And your petitioners show, in that connection, that the three members of the defendant board, namely, T. J. McCarthy, Harry J. Post and C. J. Zatarain, are members of the Crescent River Port Pilots Association.

In the vast majority of cases, the appointees have been kinsmen of one or more of the pilots, with no experience whatever as pilots prior to their "election". Membership as a commissioned pilot has been closed by the defendant board to all except those having the favor of the pilots themselves.

7

In substantiation of the foregoing allegations, your petitioners now list the names of those appointed by the defendant board in 1938 and in 1944, the last times that appointments were made, showing their relationship to pilots then commissioned, or to former commissioned pilots, and showing also their occupation prior to being chosen for appointment.

1938:

Name	*Occupation*	*Relations*
H. Vogt	Ship Launch Tender	John Vogt—uncle Peter Vogt—father
Hugo Loga	Deck Hand River Tug Boat	E. P. Loga—brother J. P. Loga—father
Laurence Jurisich	Deputy Sheriff Parish Prison	Frank Jurisich—brother George Ziblich—uncle Jake Hansen—cousin Louis Ronquillo—cousin
Harry McNeely	Independent Pilot	S. S. McNeely—uncle A. T. Price—uncle J. G. Wilson—uncle
Charles Brown	3rd Mate on Foreign Vessel	Walter Thompson—uncle
[fol. 43]		
Howard Cugle	3rd Mate on American Vessel	Charles Cugle—father
Jacob Hansen	3rd Mate on American Vessel	Geo. Ziblich—grandfather Jack Hansen—father Frank Jurisich—cousin Louis Ronquillo—cousin
Frank Richard	River Tug Boat Mate	Louis Ronquillo—cousin Frank Richmond, Sr.—father

1944:

Frederick A. Johnson	Shipyard worker	Charles Schalb—uncle
Paul Delesdernier	Dock Board Employee	Ira Delesdernier—brother Hugo Loga—cousin E. P. Loga—cousin Alford Loga—cousin George Loga—cousin Joseph Loga—uncle
William F. Short	Shipyard worker	A. W. Short—father W. F. Short—grandfather
Stanton Vogt	Dock Board Employee	Peter Vogt—father Henry Vogt—brother John Vogt—uncle Hugh Vogt—uncle
Jesse H. Sheffield	Steamship mate	none
Leander J. Marel	Tug Boat Captain	none
William L. Heuer, Jr.	Tug Boat Mate	none

8

Your petitioners show, in further substantiation of the foregoing allegations, that of the 41 present commissioned pilots, 34 of them are related to other pilots or to predecessor pilots.

9

That it is a matter of common knowledge that membership as a commissioned pilot is closed to all except those having the pilots' favor. That, nevertheless, petitioners Adolph Clark, Charles P. Henly, Marion P. Short and [fol. 44] Marion B. Kotch at various times made formal application to the defendant board to be considered as applicants for examination and that their applications were ignored.

10

That in the past your petitioners have largely centered their activity to the port of New Orleans itself, being barred by Act 54 of 1908 from piloting vessels in foreign trade on the Mississippi River below the port's limits. And, while the act applies only to vessels engaged in *foreign* trade and does not restrict petitioners' right to pilot vessels engaged in *coastwise* trade (piloting of coastwise vessels is regulated by an act of Congress and therefore not subject to state regulation) foreign-trade vessels have comprised by far the greater part of their work. The amendment wrought by Act 134 of 1942, if allowed to stand, would prevent your petitioners from piloting or handling foreign-trade vessels within the port, and would put them in a situation where they could not make a living, forcing them to seek some other pursuit; for the coastwise business would not be sufficient to support them.

11

That Act of 134 of 1942, which amended Act 54 of 1908, is unconstitutional on still another ground—it is a local or special law, and was not preceded by notice or publication as prescribed by Section 6 of Article 4 of the Constitution of 1921.

12

That for the reason hereinabove set forth Act 54 of 1908, as amended, is unconstitutional on its face. Your petitioners show however, in the alternative, that if this Honor-

able Court should for any reason hold that the act is not unconstitutional on its face, then, the arbitrary and unjust administration of the act by the defendant board as hereinabove set forth has rendered it unconstitutional, violative of the fourteenth amendment of the United States Constitution and of Section 2 of Article 1 of the Constitution of 1921 of the State of Louisiana. See Yick Wo v. Hopkins, 118 U. S. 356, 65 S. Ct. 1064, 30 L. Ed. 220.

13

That the Board of River Port Pilot Commissioners for the port of New Orleans, and the members thereof, namely, T. J. McCarthy, Harry J. Post and C. J. Zatarain, are carrying out Act 54 of 1908 as amended and are preventing your [fol. 45] petitioners from piloting vessels in foreign trade on the Mississippi River from the passes to Southport, the upper limit of the port of New Orleans, and that, for the reasons hereinabove set forth, your petitioners are entitled to an injunction restraining and enjoining them from interfering with your petitioners in the piloting of vessels, including those engaged in foreign trade, anywhere on the Mississippi River; or, in the alternative, and in the event that this Honorable Court should hold that only Act 134 of 1942, amending Act 54 of 1908, is unconstitutional, then that the defendant should be enjoined and restrained from interfering with your petitioner in the piloting of vessels, including those engaged in foreign trade, on the Mississippi River within the port of New Orleans, that is to say, between Southport and Mereauville; your petitioners show that they have no adequate remedy at law.

14

Your petitioners aver, again in the alternative, that if this Honorable Court should hold Act 54 of 1908, as amended, to be valid, then the defendant board and the above named members thereof should be ordered, by mandamus, to examine your petitioners on their qualifications as pilots and, finally, to certify them to the governor for appointment as pilots.

Wherefore, your petitioners pray that the Board of River Port Pilot Commissioners for the port of New Orleans, through its president T. J. McCarthy, and the abovenamed members of the said board, W. J. McCarthy, Harry J. Post and C. J. Zatarain, be duly cited to appear and answer this

petition and served with copies hereof, and that after due proceedings had there be judgment in favor of your petitioners and against the said defendants decreeing Act 54 of 1908 as amended to be unconstitutional, null and void, and enjoining and restraining the said defendant from carrying out, or attempting to carry out, the provision thereof, and from interfering with your petitioners in the piloting of vessels, including those engaged in foreign trade, anywhere on the Mississippi River; or, in the alternative, decreeing the said amending Act 134 of 1942 to be unconstitutional, null and void, and enjoining and restraining the said defendant from carrying out, or attempting to carry out, the provisions thereof, and from interfering with your petitioners in the piloting of vessels, including those engaged in foreign [fol. 46] trade, on the Mississippi River within the port of New Orleans, that is to say, between Southport and Mereauville.

Your petitioners pray, again in the alternative, that if this Honorable Court should hold Act 54 of 1908, with its amendments, to be valid, then that there be judgment in their favor and against the said defendants ordering them, by mandamus issued in the name of the State of Louisiana, to examine your petitioners on their qualifications as pilots and, finally, to certify them to the governor for appointment as pilots.

Your petitioners further pray for all general and equitable relief.

By their attorneys, (Signed) O'Niell & O'Niell, C. A. O'Niell, Jr., Trial Attorney.

Duly sworn to by Marion B. Kotch. Jurat omitted in printing.

[fols. 47-49] In Civil District Court for the Parish of Orleans

[Title omitted]

Exception of No Cause of Action—Filed September 29, 1944

To the Honorable, the Civil District Court for the Parish of Orleans, State of Louisiana, and the Judges Thereof:

Now Into Court, through undersigned counsel, comes Board of River Port Pilot Commissioners for the Port of

New Orleans, T. J. McCarthy, Harry J. Post and C. J. Zatarain, made defendants herein, appearing herein solely for the purpose of this exception, and except to the plaintiffs' petition on the ground that they have no cause of action.

Wherefore, exceptors pray that this exception be maintained, and that the said plaintiffs' demand be dismissed, with costs.

And for all general and equitable relief.

(Signed) Lemle, Moreno & Lemle, Attorneys for Defendants and Exceptors.

Arthur A. Moreno, Trial Attorney.

CERTIFICATE

I, Arthur A. Moreno, counsel for Board of River Port Pilot Commissioners for the Port of New Orleans, T. J. McCarthy, Harry J. Post and C. J. Zatarain, do hereby certify that the foregoing exception is well grounded in law and in reason, and is not merely for the purpose of delay.

(Signed) A. A. Moreno, Attorney for Exceptors.

Dec. 8, 1944.
Exception Maintained.
Suit dismissed.

(Signed) R. A. V., Judge.

[fols. 50-56] IN CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

No. 257, 881 Division "D" Docket 5

MARION B. KOTCH, et al.

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, et al.

JUDGMENT

For the reasons this day orally assigned by the Court.

It is Ordered, Adjudged and Decreed that the exception filed herein on September 29th, 1944, by Board of River Port Pilot Commissioners for the Port of New Orleans,

T. J. McCarthy, Harry J. Post, and C. J. Zatarain, to the petition of Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, be, and is hereby maintained, and accordingly, that there be judgment in favor of the exceptors, Board of River Port Pilot Commissioners for the Port of New Orleans, T. J. McCarthy, Harry J. Post and C. J. Zatarain, and against the plaintiffs, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, dismissing their demand, at their costs.

Judgment Read and Rendered In Open Court on December 8th, 1944.

Judgment Read and Signed In Open Court on December 14, 1944.

(Signed) Rene A. Viosca, Judge.

[fol. 57] SUPREME COURT OF THE UNITED STATES

STATEMENT AND DESIGNATION PURSUANT TO RULE 13, PARAGRAPH 9, RULES OF THE SUPREME COURT OF THE UNITED STATES—Filed July 22, 1946

To the Honorables, the Chief Justice and Associate Justices of the United States Supreme Court:

Pursuant to the provisions of paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, notice is hereby given that in the above cause the appellants will rely upon the point that Act 54 of 1908 of the Legislature of the State of Louisiana, as amended by Act 134 of 1942 of the Legislature, is unconstitutional, being violative of the Fourteenth Amendment of the United States Constitution.

The appellants deem the following parts of the record necessary for the consideration of this cause and designate that the same be printed by the Clerk of this court, pursuant to the provisions of the said rule.

1. Plaintiff's petition.

2. Opinion of the Supreme Court of Louisiana.

3. Appellants' Statement as to Jurisdiction.

4. Appellants' Assignment of Errors.

5. Appellees' Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.

M. A. Grace, 1401 Hibernia Bank Building, New Orleans, Louisiana; P. C. O'Niell Jr., 2104 American Bank Building, New Orleans, Louisiana, Attorneys for Appellants.

Service accepted on the 16 day of July, 1946.

Arthur A. Moreno, 625 Hibernia Bank Building, New Orleans, Louisiana, Attorney for Appellees.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

ORDER NOTING PROBABLE JURISDICTION—October 14, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 51,155. Louisiana, Supreme Court. Term No. 291. Marion B. Kotch, John L. Richards, Adolph Clark, et al., Appellants, vs. Board of River Port Pilot Commissioners for the Port of New Orleans, et al. Filed July 12, 1946. Term No. 291 O. T. 1946.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 291

MARION B. KOTCH, JOHN L. RICHARDS, ADOLPH CLARK, ET AL.,

Appellants,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

~~John D. Grace,~~
M. A. Grace,
Edwin H. Grace,
C. A. O'Neill, Jr.,
Counsel for Appellants.

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SUPREME COURT OF LOUISIANA

OCTOBER TERM, 1946

No. 37,809

MARION B. KOTCH, ET AL.,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, 1939, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, the appellants herein, file this their separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review a decree of dismissal of the Supreme Court of the State of Louisiana appealed from herein as follows:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section

344 (a) of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

> "Sec. 344 (a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861 (a) of Title 28 of the United States Code.

B

Statutes of the State the Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which has been sustained by a final decree of the Supreme Court of the State of Louisiana, the highest court of said state, as not being violative of the constitution and laws of the United States is Act 54 of 1908, as amended by Act 134 of 1942. The statute confers upon the pilots commissioned thereunder the exclusive right of piloting vessels engaged in foreign trade from the upper limits of the port of New Orleans to the Passes at the mouth of the Mississippi River. According to the provisions of the statute the governor may commission only those who are certified to him by the Board of River Port Pilot Commissioners for the Port of New Orleans;—and under the provisions of Section 4 of the act only those who have served as apprentices to the commissioned pilots for six months may be considered by the board.

The statute is believed to be in conflict with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

C

Dates of Judgment or Decree and of Application for Appeal

The date of the judgment and decree sought to be reviewed herein is February 11, 1946, application for rehearing filed by petitioners herein being denied March 18, 1946.

The petition for appeal herein was presented and filed on June 6th, 1946.

D

Nature of the Case and Rulings Below

By the provisions of Act 54 of 1908, pilots commissioned thereunder were given the exclusive right of piloting vessels engaged in foreign trade from the Passes at the mouth of the Mississippi River *to* the Port of New Orleans. Act 134 of 1942 amended the 1908 act by extending the commissioned pilots' exclusive jurisdiction to include the port itself.

The act applies exclusively to vessels engaged in foreign trade. Piloting of coastwise vessels is regulated by an act of Congress and hence is not subject to State regulation. *State* v. *Ring*, 122 Or. 644, 259 P. 780. The appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, are licensed river pilots holding first-class licenses from the United States Government. On the Mississippi River the business of vessels engaged in foreign trade far exceeds that of coastwise vessels. By Act 1908 the river beyond the port itself was closed as respects foreign trade vessels to all except commissioned pilots. Con-

sequently, the appellants and all other "independent" pilots have in the past centered their activity to piloting within the port itself. By the amendment of 1942, Act 134 of that year, the port was closed to them.

The appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola; Charles P. Henly, Edward J. McConnochie and Marion F. Short, filed suit in the Civil District Court for the Parish of Orleans against the members of the Board of Port Pilot Commissioners for the Port of New Orleans to have Act 54 of 1908, as amended by Act 134 of 1942, declared unconstitutional as violative of the Fourteenth Amendment of the United States Constitution; or in the alternative to have the amendment alone declared unconstitutional as violative of the Fourteenth Amendment. They prayed, again in the alternative, that if the statute and amendment should be held valid then that the defendants be ordered by mandamus to examine them on their qualifications as pilots and finally to certify them to the governor for appointment.

The defendants filed an exception of no cause of action. The exception was sustained by the district judge and the plaintiffs' suit dismissed. An appeal was taken to the Supreme Court of the State of Louisiana, and that court affirmed the judgment of the lower court.

E

Argument

Section 1 of Act 54 of 1908 provides for the appointment of a board known as the Board of River Port Pilot Commissioners for the Port of New Orleans, and Sections 2 and 3 provide for the commissioning of 28 pilots to be appointed by the governor from those pilots who were actively and continuously engaged for one year previous to the passage of the act in piloting sea-going vessels from the head of the Passes at the mouth of the Mississippi River

to the Port of New Orleans; and Section 4 provides that "whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilots shall hold examinations", of applicants for appointment, but declares that "no applicant shall be considered by said Board unless he * * * shall have served six months' apprenticeship in his proposed calling." Sections 1, 2, 3, & 4 read:

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Governor shall appoint, by and with the advice and consent of the Senate, three (3) citizens who shall form the Board of River Port Pilot Commissioners for the port of New Orleans. The first commissioners shall be appointed from those pilots who have for at least one year immediately preceding the passage of this act, exercised the functions of river pilots, from the head of the Passes to the port of New Orleans upon sea-going vessels; and thereafter said appointments shall be exclusively made from river port pilots, by virtue of this act commissioned. The Governor, in appointing said commissioners, shall designate the president of the Board. Said commissioners shall be removable by the Governor for cause, and shall qualify by taking an oath of office."

"Section 2. That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return. There shall be twenty-eight (28) such pilots, appointed and commissioned by the Governor immediately upon the promulgation of this act."

"Section 3. That the first twenty-eight (28) river port pilots hereinbefore provided for in Section 2, shall be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels from the head of the Passes to the port

of New Orleans and return, and thereafter there shall not be less than twenty such pilots."

"Section 4. That whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall have provided, with the Governor's approval, provided that no applicant shall be considered by said Board, unless he submits proper evidence of moral character and is a voter of this State, and shall have served six months' apprenticeship in his calling, and upon the certificate of the Board of the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies."

It will be noted that according to the provisions of Section 4 no one may be considered by the Board unless he "shall have served six months' apprenticeship in his proposed calling". That means simply that the applicant must have served as an apprentice to the commissioned pilots for six months. It is not six months pilot experience that is required—apprenticeship under the commissioned pilots is required. Of course the pilots themselves name apprentices. Thus they are given airtight control.

According to the allegations of the plaintiffs' petition a tight monopoly has developed. Only those having the favor of the pilots are commissioned. The most recent appointments were made in 1938 and 1944;—and the petition shows that of the 15 then appointed 12 of the appointees were related to then commissioned pilots, or to former commissioned pilots. And the petition shows that of the 41 present commissioned pilots, 34 of them are related to other pilots, or to predecessor pilots. Under the law of Louisiana, all allegations of fact are admitted, in considering an exception of no cause of action.

Ward v. *Leche*, 179 So. 52, 189 La. 113.

The decision of the Supreme Court in this case, a copy of which is annexed hereto, concedes that Act 54 of 1908, as amended, gives the commissioned pilots control of appointments, but nevertheless upholds the statute as valid legislation. The court rested its decision upon *Olsen* v. *Smith*, 195 U. S. 332, 48 L. Ed. 224, 25 S. Ct. 52. This decision actually supports the position of the appellants. Article 379 of the Revised Statutes of the State of Texas gave the board of pilot commissioners authority "to establish a term of probation not exceeding one year, as a deputy pilot, before any person can exercise the functions of branch pilot". The act was first attacked in *Patterson* v. *Board of Commissioners* (Tex. Civ. App.), 57 S. W. 1002, decided in 1900. The constitutionality of the Texas law was there attacked on the same ground that Act 54 of 1908, as amended, is here attacked, namely, that it gives the pilots themselves the power to control appointments, by giving them the right to name the deputies. The court upheld the Texas law. But it did so only after holding that the provision of the Texas law requiring service as a deputy is directory and might be ignored by the governor. The court inferred plainly that the statute would be unconstitutional if it had conferred upon the pilots the absolute right to control appointments, through the appointment of pilot deputies. *Petterson* v. *Board of Commissioners* was followed by *Olsen* v. *Smith*, [illegible] S. W. 320. The latter case, involving the identical question raised in the former, was decided on the authority of the former case. *Olsen* v. *Smith, supra*, went to the Supreme Court of the United States from the Texas Court of Civil Appeals on a writ of error. The Supreme Court adopted the interpretation passed upon the Texas statute by the Texas court, to the effect that the provision requiring service as deputy is only directory. But here it is conceded by the Supreme Court of Louisiana in its opinion in this case that the provision in the Louisiana law requiring serv-

ice as an apprentice is mandatory. The effect of the decision is to place pilots—singled out—beyond the scope of the equal protection clause of the Fourteenth Amendment. And there is no law anywhere supporting that proposition.

The following decisions support the appellants' position that the statute in question violates the Fourteenth Amendment of the United States Constitution.

Yick Wo v. *Hopkins*, 118 U. S. 356, 65 Sup. Ct. 1964, 30 L. Ed. 220;
State v. *Board of Pilotage Commissioners*, 90 P. (2d) 238, 198 Wash. 695;
State v. *Turner*, 196 So. 816, 143 Fla. 424;
Williams v. *Molther*, 198 Fed. 460;
Ring v. *Patterson*, 1 P. (2d) 1105, 170 Or. 235;
Dexter v. *Board of Commissioners*, 57 Atl. 265, 70 N. J. 429;
Williams v. *Pope*, 215 Fed. 1000;
City of Seattle v. *Gibson*, 165 P. 109, 96 Wash. 425;
Highland Farms Dairy v. *Agnew*, 16 Fed. Supp. 575;
Liberman v. *Van DeCarr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305;
Zucht v. *King*, 260 U. S. 174, 67 L. Ed. 194.

Respectfully submitted,

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE,
C. A. O'NIELL, JR.,
Counsel for Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, Appellants.

EXHIBIT "A"

Monday, Feb. 11, 1946.

SUPREME COURT OF LOUISIANA

No. 37,809

MARION B. KOTCH, ET AL.,

v.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS; RENE VIOSCA, JUDGE

ROGERS, *Justice:*

Plaintiffs hold first class pilot licenses from the United States Government and are experienced pilots on the Mississippi River and other waters. They brought this suit against the Board of River Port Pilot Commissioners for the Port of New Orleans and the individual members thereof to have Act 54 of 1908, as amended by Act 134 of 1942, under which the defendant Board was created and is operating, declared to be unconstitutional and to have its enforcement enjoined; or, if the alternative, to have the amendatory act declared to be unconstitutional and to have its enforcement enjoined. In the further alternative, plaintiffs pray if Act 54 of 1908 and its amendment be held to be valid, that the defendants be ordered by mandamus to examine them on their qualifications as pilots and, finally, to certify them to the Governor for appointment. Defendants filed an exception of no cause of action, which was sustained and the suit dismissed. Plaintiffs have appealed from the judgment.

In 1908 the Legislature passed an act regulating the system of river port pilotage for the Port of New Orleans, providing for a board of river port pilot commissioners, defining its duties, prescribing the necessary qualifications for port pilots and fixing their charges. Act 54 of 1908.

Section 1 of the act creates the Board of River Port Pilot Commissioners for the Port of New Orleans to consist of three citizens to be appointed by the Governor with the consent and advice of the Senate. Sections 2 and 3 provide for the appointment and commissioning by the Governor of twenty-eight pilots from those pilots who were actively and continuously engaged for one year previous to the passage of the act in piloting sea-going vessels from the head of the Passes to the Port of New Orleans and return. Section 4 declares that whenever there exists a necessity for more pilots among the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations of applicants for appointment under such rules and regulations and with such requirements as they shall have provided with the approval of the Governor; provided no applicant shall be considered by the Board unless he submits proper evidence of moral character, is a voter of the State, and shall have served six months apprenticeship in his proposed calling. Section 4 further provides, upon the certificate of the Board to the Governor that the applicant has complied with the provisions of the act, the Governor may in his discretion appoint to existing vacancies.

Act 134 of 1942 amends Act 54 of 1908 by providing it shall be the duty of the body of pilots known as "River Port Pilots" to pilot sea-going vessels from Pilot Town to Southport and return and within the Port of New Orleans, and providing further that the river port pilots shall be entitled to the exclusive right to pilot vessels within the Port of New Orleans between Southport and Mereauxville.

Plaintiffs' petition alleges, in substance, that Act 54 of 1908, on its face, is violative of the Fourteenth Amendment of the Federal Constitution and of Section 2 of Article 1 of the State Constitution. The petition further alleges that the legislative act does not contain any provision for competent examinations and also fails to lay down any rules for the Board to follow in the commissioning of pilots, but, on the contrary, the act vests in the Board arbitrary powers in that connection. That the Board has always assumed and exercised arbitrary authority in respect to the commissioning of pilots; that no examinations have ever been

held by the Board; that appointments have always been made on a personal basis—the appointee being first "elected" by vote of the members of the Port Pilots Association, an organization composed exclusively of commissioned river pilots; that the three members composing the Board are members of the Crescent River Port Pilots Association, and in the vast majority of cases the appointees have been kinsmen of one or more of the pilots, with no experience whatever as pilots prior to their election.

The petition further sets out the names of a number of pilots who were appointed in 1938 and 1944, the last time appointments were made, and also sets out their relationship to those pilots then holding commissions or to pilots formerly holding commissions; that thirty-four of the forty-one pilots presently holding commissions are related to other pilots or to their predecessors.

The petition alleges it is a matter of common knowledge that membership as a commissioned pilot is closed to all persons except those favored by the pilots; that nevertheless four of the petitioners, whose names are mentioned at various times, made formal application to the defendant Board to be considered as applicants for examination as pilots and that their applications have been ignored. That being barred by the provisions of Act 54 of 1908 from piloting vessels in foreign trade on the Mississippi River below the limits of the Port of New Orleans, petitioners in the past have largely centered their activity to the Port itself, but that under the provisions of Act 134 of 1942, amending Act 54 of 1908, they are prohibited from piloting vessels engaged in foreign trade within the Port and are placed in a position where they are not able to make a living since the coastwise business is not sufficient for their support.

The petition alleges that for the above reasons Act 54 of 1908 and its amendment, Act 134 of 1942, are unconstitutional, and that in addition thereto Act 134 of 1942 is unconstitutional because it is a local or special law which was not preceded by notice or publication as prescribed by Section 6 of Article 4 of the Constitution of 1921.

The contentions raised by the petition require this Court to determine whether Act 54 of 1908 and its amendatory

Act 134 of 1942, on the face thereof are violative of the Federal and State Constitutions; whether if they are constitutional the acts have been rendered unconstitutional by the arbitrary, discriminatory and unjust way in which they have been administered by the defendant Board and, in the alternative, whether Act 134 of 1942 is a local or special law enacted without the constitutional requirement of notice or publication. In considering these contentions it should be kept in mind that under the exception of no cause of action only the well pleaded facts and not the conclusions of law contained in the petition must be accepted as true.

Pilot regulations are regulations of commerce upon navigable waters. In Ex Parte McNiel, 13 Wall. 236, 20 L. Ed. 624, it was said by the Supreme Court of the United States: "It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; * * *. Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation. * * *"

It has long been settled by decisions of the Supreme Court of the United States that although state laws concerning pilotage are regulations of commerce they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject. Cooley *v.* Port Wardens, 12 How. 299, 13 L. Ed. 996; Ex Parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Wilson *v.* McNamee, 102 U. S. 572, 26 L. Ed. 234; Olsen *v.* Smith, 195 U. S. 332, 49 L. Ed. 224; Anderson *v.* Pacific Coast Steamship Co., 225 S. W. 187, 56 L. Ed. 1047.

Since Congress has not acted to relieve vessels engaged in foreign trade from the provisions of state pilotage laws, the State has power to legislate concerning such pilotage.

Pilotage is not merely a business. It is a highly specialized and hazardous calling which, in the absence of action

by Congress, is under the control of the State. By the adoption of Act 54 of 1908, as amended by Act 134 of 1942, the Legislature, in the protection of the public interest, has undertaken to regulate pilotage on the Mississippi River on vessels engaged in foreign trade from the Passes at the mouth of the river to Southport above New Orleans, which includes the pilotage of such vessels within the port itself.

Plaintiffs agree that the pilotage of vessels engaged in foreign trade is subject to state regulation, but they insist that such regulation must not be arbitrary or discriminatory, which they contend is the case with respect to the statutes in question. Plaintiffs' contention is based upon the Fourteenth Amendment to the Federal Constitution and Section 2 of Article 1 of the State Constitution. The argument is that the right of a person to render pilotage services is a fundamental right guaranteed by the constitutional provisions, and that therefore Act 54 of 1908, as amended by Act 134 of 1942, providing for the commissioning of pilots and restricting the right to pilot to the duly commissioned pilots are violative of those provisions. But the argument in effect merely denies that pilotage is subject to governmental control and has been settled to the contrary by numerous decisions of the Supreme Court of the United States.

It is indisputable that the right to follow any of the ordinary occupations of life is one of the privileges of citizenship, and this includes the right to pursue any lawful occupation without statutory restrictions except such restrictions as may be applied to all persons pursuing the same occupation under the same conditions. But it is also indisputable that there are certain occupations in which the public has such interest as will make those occupations subject to statutory regulations, or even prohibition. The constitutional provisions on which plaintiffs rely were not designed to interfere with the public powers of the State; and within the limits stated by the Constitution, Federal and State, the Legislature is free to determine what subjects are proper to be legislated upon in the conservation or order, morals, health and safety. The cases relied on by plaintiffs, including the much cited case of Yick Wo *v.*

Hopkins, 118 U. S. 356, 30 L. Ed. 220, holding invalid a municipal ordinance which authorizes the issuing or withholding of a license to one engaged in a lawful business and which grants to an officer or set of officers the authority to determine the number of persons who shall engage in that business, have no application to a legislative act which vests in a board of port commissioners the power to license and determine who shall render pilotage services and limiting the number thereof.

The argument that the statutes under review confer upon the commissioned pilots a monopoly of the business and permits them by a combination among themselves to exclude all other persons from rendering pilotage service is also in effect a denial of the power of the State to regulate the business since, if the State has power to regulate and in so doing to name and commission those who are to perform pilotage service, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them under the law.

The authorities support the legal propositions we have hereinabove referred to concerning the right of the State to control and regulate the business of pilotage within its territorial limits. Thus in People ex rel. Palmer *v.* Woodbury, 14 Cal. 43, a statute of California was sustained, which provided for a board of commissioners with power to appoint such number of pilots as they might deem necessary, not exceeding thirty. There it was left to the discretion of the board to determine the number of pilots, subject only to the provision fixing the maximum number of such pilots. In Caples *v.* McNaught, 147 Or. 72, 31 Pac. 2d 780, a legislative act was sustained which created a board of pilot commissioners and made it its duty, "to maintain a sufficient number of pilots upon the bar and river pilot ground to meet the demands of commerce * * *." In that case also the court upheld the right of the Legislature to confer upon the pilot commissioners the power to determine the number of pilots.

The leading and controlling case on the subject is Olsen *v.* Smith, 195 U. S. 332, 49 L. Ed. 224. There the Supreme

Court of the United States announced the principles that should be applied in determining the constitutionality of legislative acts regulating pilotage. In that case, the constitutionality of an Act of the Legislature of the State of Texas regulating the business of pilotage was sustained. The Texas law, like the Louisiana law, provided that the Governor should appoint a board to which was granted the power of fixing charges, regulating the manner in which the pilots should perform their duty, examining them as to their qualifications, hearing complaints against them and, if the occasion required, to suspend them until the Governor should act. The authority was conferred upon the Governor to appoint such number of branch pilots as might from time to time be necessary, each of whom should hold office for two years, subject to removal by the Governor at pleasure. Anyone who was not duly commissioned was prohibited from engaging in the business of pilotage so far as the statute provided for rendering of pilotage services by the duly appointed pilots. The only difference between the Texas law and the Louisiana law is that the Board of Pilot Commissioners under the Louisiana law is composed of three members, whereas the Texas board is composed of five members. The nature of their powers and duties is substantially the same. The term of appointment under the Texas law is for two years. Under each statute, however, the pilots so appointed are subject to removal by the Governor at pleasure. The Supreme Court of the United States, speaking through Mr. Justice White, later Chief Justice, and formerly a Justice of this Court, held that no inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed. And further, since the State, under its power to regulate, has the right to appoint and commission pilots, no monopoly or combination can arise from the fact that the authorized agents of the State are alone permitted to perform the duties with which they are charged under the law. After discussing these propositions, Justice White remarked as follows: "When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of

power, but that they are unwise. If an analysis of those laws justified such conclusion,—which we do not at all imply is the case,—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises." And so we may remark here, if the statutes in question are unwise the remedy lies with the Legislature in whom the ultimate authority on the subject is vested and not with the court to deny the right of the power of the State to exercise its authority over a matter wholly within its control.

Many authorities are cited on behalf of plaintiffs which announce or reaffirm sound principles of law, but we fail to find their application to the issues involved in this case. For example, it is argued that the doctrine for which plaintiffs contend is sustained by the case of State *v.* Board of Pilot Commissioners, 198 Wash. 695, 90 Pac. (2d) 238. Counsel for plaintiff insists that this case is exactly in point. We can not agree. It is true in that case the Supreme Court of the State of Washington, by a divided Court, held that under the law of Washington the Board of Pilot Commissioners must hold examinations and issue certificates to those successfully passing the examination. But, as shown by the opinion of the Court, that was because there was nothing in the statute specifically giving the Board the right to limit the number of pilots. Under the terms of the statute every person was given the right to take the examination and, if he successfully passed, to receive a certificate. In other words, the statute of Washington, which was involved in that case, did not limit the number of pilots, but merely created a board to hold examinations and issue certificates. There was no limit placed upon the number of pilots and the mere possession of a certificate of proficiency entitled the holder to operate as a pilot. Under the statutes of this State the mere passing of an examination does not entitle the successful applicant to a commission as a pilot. The number of pilots is limited and the appointments are only when the Governor is informed by the Board that the necessity exists for the creation of additional pilots. The

difference between the law of Washington and the law of Louisiana is clear. Under the law of Washington, the Governor does not appoint, but the commissioners are compelled to issue a certificate to anyone who successfully passes the required examination. Under the law of Louisiana, a person can only become a pilot when he has served an apprenticeship, has passed the examination, and has received a commission from the Governor.

In discussing the cases of Olsen *v.* Smith, Caples *v.* McNaught and Palmer *v.* Woodbury, the Supreme Court of Washington pointed out that those cases were distinguishable on the facts from the case which it was deciding and that also in those cases the Legislature of the respective states, either directly or by implication, conferred authority upon the board or individuals to limit the number of pilots, whereas the statute of Washington conferred no such power on the board either expressly or impliedly.

It is argued with great earnestness on behalf of plaintiffs that, if the statutes in question are constitutional on their face, they are rendered unconstitutional by the arbitrary manner in which they are administered by the defendant Board of River Pilot Commissioners. In plaintiffs' petition it is alleged that the defendant Board has always assumed and exercised authority with respect to the commissioning of pilots; that no examinations have been held and that appointments have always been made on a personal basis, the appointee being first selected by the members of the Crescent River Port Pilots Association, an organization composed exclusively of commissioned river pilots and of which the three defendant commissioners are members; that in a vast majority of cases, the appointees have been kinsmen of one or more of the pilots with no pilotage experience whatever prior to their selection; and that it is a matter of common knowledge membership as a commissioned pilot is closed to all except those having the favor of the pilots.

Generally speaking, the constitutionality of a statute must be determined not by what is done, but what it authorizes to be done under its provisions. Thus in Ward *v.* Leche, 189 La. 113, 179 So. 52, this Court recognized and followed the principle of constitutional law that courts can not

annul or pronounce void any act of the Legislature on any other ground than that of repugnancy to the Constitution.

The fact that power is particularly given and may be abused by incompetent or unscrupulous officials chosen to administer it does not justify the argument that the power itself can not be constitutionally exercised, for it is only because of the existence of the power that makes possible its abuse.

The allegations of the petition to which we have referred, are, in their essence, that Crescent River Port Pilots Association controls the commissioning of pilots. But there is a clear distinction existing between the Board of River Pilot Commissioners and the River Pilots Association. The Board of Commissioners is composed of pilots commissioned by the Governor as officers of the State. The Pilots Association is a private corporation organized under the general corporation laws of the State. The Legislature, in adopting Act 54 of 1908, recognized the need for an association of pilots and so provided. Section 6 of the Act provides: "That said River Port Pilots may form themselves into an association or associations, as to them may seem fit, not in conflict with law or the rules and regulations of the River Port Pilot Commissioners."

As was pointed out by the Supreme Court of the United States in Ex Parte McNiel, 13 Wall. 236, 20 L. Ed. 624, the service in which pilots are engaged is one of great importance, frequently full of hardship and sometimes of peril and, regardless of time and weather conditions, they must be in their places ready to perform the duties of their vocation. Pilots must board ships; and there must be a pilot boat ready at all times to take the pilot to and from the ships. Pilot stations, crews to operate the pilot boats, and pilots to care for vessels which arrive at irregular intervals must be constantly maintained to promptly furnish the needed service. If, in view of these considerations, the Legislature concluded that an association of pilots rather than pilots operating singly and alone would best serve the purpose of commerce and navigation, it is not for the Courts to question the wisdom of the Legislature in enacting the legislation authorizing the creation of the River Port Pilots Association and limiting the membership thereof. There is

nothing in the law which requires the Crescent River Port Pilots Association to admit to membership persons not of their selection. If an apprenticeship must be served under pilots who are members of the association, because as a practical matter it may not be served otherwise, there is nothing in the law which forbids this situation to arise.

It is argued that the Board of River Port Pilots dictates the appointment of pilots but, when tested by the terms of the statute itself, the argument must fall. The only power conferred by the statute upon the Board of Pilot Commissioners is the power, when the necessity exists for additional pilots, to hold examinations under such rules and regulations and with such requirements as they may provide, with the Governor's approval. In holding these examinations, the Board is limited to applicants who submit proper evidence of their moral character, are voters of the State, and have served six months apprenticeship in their proposed calling. Upon the certificate of the Board to the Governor that the applicants have complied with the provisions of the act, the Governor may, in his discretion, appoint to existing vacancies. The Board of Commissioners has nothing to do with the selection of apprentices. Plaintiffs' charge that only a favored few may become apprentices is a charge levelled against the Pilots Association and has no relation whatsoever to any action of the Board. The statute does not provide for the appointment of those making the highest grades. It merely provides that the applicant shall have served an apprenticeship of six months and have passed the examination prescribed by the Board of Commissioners. The right to make the appointment is conferred upon the Governor and plaintiffs can not be heard to complain because the Governor in exercising his authority appoints some persons who are closely related to other pilots instead of ignoring such relationship and appointing plaintiffs. The reasons which move the Governor to make the appointments are beyond judicial inquiry.

It is argued that Act 134 of 1942 is a special or local law, enacted by the Legislature without compliance with the provisions of Section 6 of Article 4 of the Constitution, requiring previous publication of notice of the intention

to apply for its enactment. State *v.* Clement, 188 La. 923, 178 So. 493, is cited in support of the argument. But we do not understand that the cited case establishes a different rule from those cases which point out the distinction between a special law and a general law. The statute involved in that case restricted its application to swamp lands whose boundaries were within one hundred and fifty miles of the shore line of the Gulf of Mexico. It did not affect swamp lands located in other portions of the State. The court, after discussing the principles governing special laws and general laws, respectively, held that the classification of areas contained in the statute was wholly arbitrary and unreasonable and by reason thereof it became a special law within the constitutional provision, requiring publication, and not a general law.

The leading case of State *v.* Dalon, 35 La. Ann. 1144, contains a full discussion on the subject of special laws and general laws. In that case the legislative act organizing the Criminal District Court for the Parish of Orleans was involved. Dallon, who was convicted of arson, challenged the validity of his conviction on the ground that the creation of the machinery of the Criminal District Court was a local or special law requiring publication, because it did not operate throughout the State and all of the parishes thereof. The Court, after characterizing the contention as preposterous and one that could not stand criticism, pointed out that: "The real distinction between public or general laws and local or special laws is, that the former affect the community as a whole, whether throughout the State or one of its subdivisions; and the latter affect private persons, private property or local private interests."

There are a number of decisions of this Court holding that a statute is not a special or local law merely because of the fact that the conditions under which it can operate prevail in only certain parts of the State. See State *v.* Donato, 127 La. 393, 53 So. 662; Shreveport *v.* Nejin, 140 La. 785, 73 So. 996; State *v.* Nejin, 140 La. 793, 74 So. 103; State *v.* McCue, 141 La. 417, 75 So. 100; Clark *v.* Opelousas, 147 La. 1, 84 So. 433.

In State *v.* Donato, a liquor statute that was restricted to apply only to prohibition parishes, was held to be a

general law notwithstanding the restriction. In that case this Court held: "A law, general in its terms, applying to all persons * * *, is not a 'local law' * * * merely because the conditions under which it can operate prevail only in certain parts of the state."

The general rule is set forth in 59 Corpus Juris, at page 536, as follows: "A statute is not a local or special law within the meaning of constitutional provisions requiring notice if persons or things throughout the State are affected, or if it operates on a subject in which the people at large are interested, even though its enforcement be restricted to a particular locality, or if an act is both general and special or private."

Pilots are State officers, created by the Legislature. The source of legislative authority is the police power of the State. Its exercise is in the promotion of the general welfare. The fact that the Legislature deemed it necessary to regulate pilotage on the Mississippi River between Southport and Pilot Town, but did not find it necessary to regulate pilotage in other parts of the State does not make the regulatory statute a local or special law. The statute was adopted by the Legislature in the exercise of State sovereignty and the fact that the exercise of such sovereignty is not required for the regulation of pilotage throughout the States does not bring the law within the requirement of Section 6 of Article 4 of the Constitution. The test of whether a law is special or local is whether it operates only on a certain number of persons, within a class, but does not affect generally all persons within that class. The regulation by the Legislature of pilotage between Southport and Pilot Town without attempting to regulate it where such regulation is not needed is a matter solely for legislative determination. It would lead to an absurd result for the Legislature, in the exercise of the sovereign powers of the State, to prescribe regulations for pilots on every bayou and stream in the State. The congestion of shipping within the harbor of the Port of New Orleans and on the Mississippi River between Pilot Town and the upper limits of the port is obviously the reason for the legislation. Its need grows out of the congestion of such shipping and the demands of interested parties for the protection of

commerce by the regulation of pilotage. No argument is necessary to sustain the proposition that the Legislature is not required to regulate pilotage where such regulation is not needed in order to regulate pilotage where such pilotage is needed.

Plaintiffs ask, in the alternative, that the defendant Board be ordered to examine them as to their qualifications as pilots and, finally, to certify them to the Governor for appointment as such. But, in so asking, plaintiffs fail to show the need for additional pilots and that they have served an apprenticeship of six months as required by the statute. What plaintiffs are seeking, in the final analysis, is the right to become pilots upon the Mississippi River under the provisions of Act 54 of 1908, as amended, without showing compliance with the provisions of the statute. Plaintiffs, in effect, ask the court to compel the Governor to name them as pilots notwithstanding, when their demand is tested by the terms of the statute, no vacancy exists and notwithstanding plaintiffs do not possess the qualifications required by the act. Plaintiffs ask the court to do those things because they allege that the Crescent River Port Pilots' Association, a private organization created under the terms of the act, selects its own apprentices, as it is authorized to do under the statute. But the Court can not comply with plaintiffs' request without creating in lieu of a constitutionally enacted statute a ruling of its own, based upon the alleged hardship arising out of the selection by the Crescent River Port Pilots Association of the apprentices who might thereafter become members of the organization. This the Court can not do. The justice or injustice of the statutory provision permitting the River Port Pilots Association to select apprentices is a question for the Legislature and not for the Court.

For the reasons assigned, the judgment appealed from is affirmed.

Rehearing Denied March 18, 1946.

IN THE

Supreme Court of the United States

October Term, 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO DISMISS.

M. A. GRACE,
EDWIN H. GRACE,
CHARLES A. O'NIELL, JR.,
Counsel for Appellants.

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ARGUMENT.

The appellees have filed a motion in this cause to dismiss the appeal, or in the alternative to affirm the decree entered below. The appellees contend, as a basis for the motion, that the question here presented is settled by the decision rendered by this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52. They state:

> "Because the question has been clearly and unqualifiedly decided against the appellants here, the appeal offers no substantial question for decision by this court."

The appellees are in error. *Olsen v. Smith, supra,* does not support their position. The jurisprudence involving the Texas pilot law that was considered in *Olsen v. Smith, supra,* and which culminated in that decision, actually supports the position of the appellants.

The statute in question here is Act 34 of 1908 of the Louisiana Legislature, as amended by Act 134 of 1942, which undertakes to regulate pilotage on the Mississippi River. The original law, Act 54 of 1908, conferred upon the pilots commissioned thereunder the exclusive right of piloting vessels engaged in foreign trade from the Passes at the mouth of the Mississippi to the port of New Orleans. Act 134 of 1942 amended the 1908 act by extending the commissioned pilots exclusive jurisdiction to include the port itself, declaring that the "river pilots shall be entitled to the exclusive right to pilot vessels within the port of New Orleans between Southport and Mereauville, Louisiana."

It should be borne in mind that piloting of vessels engaged in coastwise trade is regulated by an act of Congress (Rev. St. U. S. #4444, U. S. Camp. St. 1901, p. 3037), and hence is not subject to state regulation. *Olsen v. Smith, supra.* It follows therefore that Act 54 of 1908 as amended applies exclusively to foreign trade vessels.

The appellants Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, instituted this suit against the Board of River Port Pilot Commissioners for the Port of New Orleans to have Act 54 of

1908, as amended by Act 134 of 1942, declared unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. They sought, in the alternative, to have the 1942 amendment alone declared unconstitutional on that ground. And they asked, again in the alternative, that if the act and amendment be held valid, then that the defendant board be ordered by mandamus to examine them on their qualifications as pilots, and finally to certify them to the governor for appointment.

The plaintiffs, appellants, alleged in their petition that they are licensed river pilots holding first class licenses from the United States government; that they are well qualified, having been actively engaged as pilots—on the Mississippi River and other waters, but principally on the Mississippi—for more than 15 years; that Act 54 of 1908 conferred upon the defendant board and on the commissioned pilots themselves absolute power in respect to appointments; that by the provisions of the act only those having the favor of the pilots themselves can be appointed; that in the past the plaintiffs have centered their activity largely to the port itself—being barred by Act 54 of 1908 from piloting foreign trade vessels below the port's limits; that coastwise shipping represents only a minor part of the business on the Mississippi—far too small for them to earn a livelihood from that source alone; that the 1942 amendment, closing the port to them, will force them to give up their occupation as pilots and seek other pursuits.

The defendants filed an exception of no cause of action. By the law of Louisiana all well-pleaded allegations of

fact are admitted in considering an exception of no cause of action. *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 2d 233; *Jones v. Saucier*, 203 La. 775, 14 So. 2d 775; *In Re Nunez*, 203 La. 847, 14 So. 2d 680. The exception of no cause of action is similar to the demurrer at common law.

The judge of the district court maintained the defendants' exception of no cause of action and dismissed the plaintiffs' suit. The Supreme Court affirmed the judgment on appeal. And the appeal to this court was then taken.

Act 54 of 1908 as amended is clearly unconstitutional. It gives the commissioned pilots airtight control of appointments. It is plain that the act was drawn with that purpose in view. Section 1 creates the Board of River Port Pilots for the Port of New Orleans; Sections 2 and 3 provide for the appointment by the governor of the first group of pilots—28 in number; and Section 4 declares that "whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examination", and states that "no applicants shall be considered by said board *unless he * * * shall have served six months' apprenticeship in his proposed calling.*" (Italics ours.)

No one may be considered for appointment unless he first serves as an apprentice to a commissioned pilot. The pilots name the apprentices, of course. Thus they control all appointments. The case is just that simple.

Sections 1, 2, 3 and 4 are quoted below:

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Governor shall appoint, by and with the advice and consent of the Senate, three (3) citizens who shall form the Board of River Port Pilot Commissioners for the port of New Orleans. The first commissioners shall be appointed from those pilots who have for at least one year immediately preceding the passage of this act, exercised the functions of river pilots, from the head of the Passes to the port of New Orleans upon sea-going vessels; and thereafter said appointments shall be exclusively made from river port pilots, by virtue of this act commissioned. The Governor, in appointing said commissioners, shall designate the president of the Board. Said commissioners shall be removable by the Governor for cause, and shall qualify by taking an oath of office.

"Section 2. That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return. There shall be twenty-eight (28) such pilots, appointed and commissioned by the Governor immediately upon the promulgation of this act.

"Section 3. That the first twenty-eight (28) river port pilots hereinbefore provided for in Section 2, shall be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels from the head of the Passes to the port of New Orleans and return, and thereafter there shall not be less than twenty such pilots.

"Section 4. That whenever there exists a necessity for more pilots among the river port pilots,

> the said Board of River Port Pilot Commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall have provided, with the Governor's approval, provided that no applicant shall be considered by said Board, unless he submits proper evidence of moral character and is a voter of this State, and shall have served six months' apprenticeship in his proposed calling, and upon the certificate of the Board of the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies."

The appellees contend that *Olsen v. Smith, supra,* determines the case against the appellants. But that case, fairly considered, supports the appellants.

To understand *Olsen v. Smith, supra,* the jurisprudence leading up to that decision must be reviewed.

The Texas pilot law was first attacked in *Petterson v. Board of Commissioners,* (Tex. Cir. App.), 57 S. W. 1002, decided in 1900. Article 3792 of the Revised Statutes of Texas gave the pilot board authority "to establish a term of probation not exceeding one year, as a deputy pilot". In *Petterson v. Board of Commissioners, supra,* the constitutionality of the Texas law was attacked on the same ground that Act 54 of 1908 as amended is here attacked, namely, that it gave the commissioned pilots the right to control all appointments. In *Petterson v. Board of Commissioners, supra,* the court upheld the Texas law. But it did so only after holding that the deputy provision in the statute is *directory.* The court held that under the Texas law the commissioned pilots do not control the ap-

pointments, since the provision requiring service as a pilot deputy is directory and might be ignored by the governor. The court inferred plainly that the statute would be unconstitutional if the deputy provision were mandatory.

The distinction between the Act 54 of 1908 as amended and the Texas pilot law is plain. The apprentice provision in the Louisiana pilot law is mandatory. The Supreme Court of Louisiana so held. And counsel for the appellees concede that to be true. We shall hereafter discuss that phase of the case in more detail.

We shall quote from *Petterson v. Board of Commissioners, supra,* at length—so that Your Honors will have a clear understanding of the ruling there made. *Olsen v. Smith, supra,* relied on by the appellees in their motion to dismiss, does nothing more than affirm its doctrine, as we shall point out her after. In *Petterson v. Board of Commissioners, supra,* the court said:

> "Then follows an allegation that there are only 11 branch pilots in service at the port; that they have unlawfully associated themselves together into a co-partnership under the name of 'Galveston Pilots' Association', for the purpose of monopolizing and controling the pilotage of the port, and have so acted for several years; that they refuse to appoint any one as deputy who will not agree to act under and subordinate to the rules, orders and regulations made by the association; that the refusal of appellees to examine any one except such as have been appointed by the present branch pilots as a deputy pilot, and the refusal of said pilots' association to deputize petitioner or any one else who desires to

work in competition with said association, creates a monopoly in favor of the existing pilots, contrary to law, and against the rights of petitioner.

"The articles of the Texas statutes (Rev. St.) bearing upon the subject provide as follows:

"Article 3790: 'The governor shall appoint with the consent of the senate for each port whose population and circumstances shall warrant it, * * * a board of five persons of respectable standing under the denomination of "commissioners of pilots".' The remainder of the article prescribes their qualifications, etc., and empowers the governor to suspend, fill vacancies, etc.

"Article 3791 provides that 'the board of commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they may find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the governor, where new appointments are proper, such as are meritorious, and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized after due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office. The governor, however, shall have power at his will and pleasure to remove any branch pilot or to reinstate any one who has been so suspended.'

"Article 3792 provides that the board of commissioners 'shall require a certain term of residence in

the state of Texas to authorize any person to exercise the functions of a branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year as a deputy pilot before any person can exercise the functions of his office.'

"Article 3793 provides: 'The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix the rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution.'

"Article 3794 provides: 'The board shall be authorized and required to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services * * * as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master * * * when such pilot might have been landed.'. The remaining portions of this article fix the maximum of such compensation, and provides for appeals from the judgments of the board in such cases.

"By article 3796 the governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be

necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term only."

"By article 3797 branch pilots are required before entering upon the duties of their office, to enter into bond with sureties in the sum of $5,000, payable to the governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond is to be approved by the board of commissioners, and filed with the secretary of state. The oath of office prescribed by the constitution is also required to be taken and subscribed by each pilot, such oath to be indorsed on the back of the bond, and, together with the bond, is to be recorded in the county of the port before being forwarded to the governor.

"Under article 3798, each branch pilot may appoint two deputies, subject to examination and approval by the board, and a pilot appointing a deputy without such approval forfeits his own appointment. The board is also clothed with authority to restrict all deputy pilots from piloting vessels over a certain draught.

"Article 3799 provides the penalties of suspension and dismissal for certain named acts of malfeasance.

"Article 3800 fixes the rate of pilotage upon classes of vessels subject thereto, and provides that the master of a vessel refusing the services of a pilot shall be liable to such pilot for half the rate of pilotage which he would have earned if accepted.

"Article 3803 prescribes a penalty of $50 against any unauthorized person acting as branch pilot, such penalty to be recovered at the suit of any duly-au-

thorized branch pilot, brought in any court of competent jurisdiction.

"The above articles are believed to be all of the Texas pilotage laws which have any bearing on the questions raised on this appeal, or which are necessary to be discussed in this opinion.

"The trial court seems to have held the petition insufficient to show the plaintiff entitled to the writ, (1) because under the law the position of branch pilot is an office to which the governor has the power, in his absolute discretion, to appoint such persons, and such a number of persons, as he may consider necessary for the needs of the port, and the petition does not show that the governor has thought it necessary to appoint a greater number than are now in service; (2) these appointments are required under the law to be made from the class of persons who have complied with the requirements as to residence in the state for the time fixed by the commissioners, and as to service as deputy pilot for the time fixed by them, and the petition does not allege the plaintiff to be one of that class.

"Appellant's first, second, fourth, fifth, and sixth assignments of error are thus interpreted by his proposition thereunder: 'When a skilled seaman, who is by education, training and experience mentally, morally, and physically qualified to act as pilot for the port of Galveston, applies to the commissioners to be examined as to his qualifications to act as branch pilot, the board should examine the applicant, notwithstanding the fact that he has never been appointed or served as deputy pilot for the port.' Under this appellant contends that the provision empowering branch pilots to select two deputies, and providing that no person who has not

served the requisite term as deputy can become a branch pilot is inoperative—First, because the article undertaking to empower the board to fix a term of probation for deputy pilots is void for uncertainty, and if not void for uncertainty is merely directory and if not void nor merely directory is unconstitutional, because it places it in the power of pilots already servicing to continue themselves in office or become their own successors by refusing to appoint deputies, or by discharging those appointed before the time of probation expires; second, the law, construed as a whole clearly requires the board to examine and report upon every applicant, in order that the governor, in his discretion, may appoint such persons, and such number, as the needs of the port may require, and thus accomplish the objects contemplated by the law.

"While the latter clause of article 3792 is of faulty construction, we do not believe it can be held to be void for uncertainty. The sense of it seems to us very plain, and the defect complained of is so insignificant and obscure that a casual reading of the article does not disclose it. We do not deem it necessary to follow counsel for appellant in his discussion of the rules of construction. The article has stood unchanged since 1846, the date of its passage. So far as we are able to ascertain, the construction placed upon it has been uniform. No one has been misled by the defective phrase, 'as also to', etc. It is not a statute which has only occasionally been called into force, but has been an active, operative statute by which the boards of pilot commissioners have been controlled, and under which the important service of pilotage has been conducted. If a graver reason were urged, the court might well hesitate to hold a statute void for uncertainty which has

for so many years received a common and uniform construction, and has answered the purposes for which it was passed. If, as contended by appellant, the provision is merely directory, we fail to perceive in what respect appellant could be benefited by such a holding. Directly statutes are not void, nor may they be suspended for that reason at the suit of an individual. The question usually arises when the validity of some official act is called in question on the ground that the statutory prerequisites have not been performed. If the statute is mandatory, the official act is invalid; if directory merely, the act may nevertheless stand. *In the case at bar there are strong reasons for holding the provision directory ,and this aspect of the clause will be referred to further on in this opinion.* (Italics ours.)

"The further contention of appellant in this connection, to the effect that the provision is directory, and therefore cannot limit a prior mandatory provision which requires the board to examine all applicants, is, we think, unsound. These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public con-

cern is ever greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789, Congress, finding that the various states whose territory touched navigable waters had enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several states, and such as thereafter might be passed by them; thus relegating to the states a power which by an article of the federal constitution they had conferred upon Congress. For this reason the states are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.) 14 Fed. 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question, and it seems clear that when the duty was imposed to 'examine each new applicant, * * * recommending to the governor, where new appointments are proper, such as are meritorious', it was meant to provide against the recommendation of any person without the careful examination required. *Of course, there is a point beyond which the lawmakers cannot go in subordinating the interest of the individual to the welfare of the public, and if the petition had alleged a compliance on the part of plaintiff with the provisions as to residence and service, and had further alleged that the governor had declared that*

new appointments were proper, the court would doubtless have allowed the writ to prevent the discrimination against him which would have been apparent from the allegation. He would have had the same right as another to have his name considered by the governor, if he was found to possess the requisite qualifications. That the right of an individual to examination and appointment is not absolute is evidenced by parts of this very law which are not assailed, notably the power confererd on the governor to limit the number of pilots in any port, being controlled in his discretion by the needs of the port; also the power of the governor to remove any pilot for any reason, or for no reason, the language of the act being, 'at his will and pleasure'. (Italics ours.)

"Recurring to article 3791, it seems to us to have been intended that the governor should have both the appointing power and the discretion as to the needs of the port, the board in this latter respect being advisory. This conclusion is authorized both by the language of the act and the object sought to be accomplished. The board resides at the port, and, being charged with the duty of appointing stations and hours for the pilots, must, in the exercise of that duty, learn the necessities of the port, and it would be their plain duty, if new or other pilots were necessary, to call the governor's attention to the situation, and recommend suitable persons from whom he might select. The governor might ignore their suggestions, or conclude, in the absence of suggestions, that more were necessary, in which event he could require them to furnish him with names as provided by law. To hold that the board should examine all who apply would be

to compel them to do in many cases an idle and futile thing; for if no vacancy existed, and no new appointments were necessary, there could be no purpose to be accomplished by the examination. If any considerable time elapsed from the date of the examination until the appointment was necessary, the applicant might in many ways become unsuitable,—might cease to be 'meritorious'. The clause, 'where new appointments are proper', cannot be held to be meaningless. If the state had the power to limit the number of pilots at this port, the whole act can stand. (Italics ours.)

"*Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of perversion or abuse, cannot render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first place, if the clause requiring a term of service as branch pilot be directory (and it seems to be so), the governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications.* Again, the board has power to suspend, and the governor to remove, in such a

case, and the pilots in office could be so disciplined as to compel a cessation of the abuse complained of. If the pilots in office, for the purpose of maintaining themselves in office, should adopt a system of discharging their deputies just before the expiration of the probationary period, their purpose could be easily thwarted under the power possessed by the Board to fix or change the probationary period at will, and this could be done without notice, and the deputies in service be thus placed in a position to be examined for appointment." (Italics ours.)

Petterson v. Board of Commissioners, supra, did not reach this court. It was followed closely by *Olsen v. Smith,* (Tex. Cir. App.) 68 S. W. 320, decided in 1902. (*Olsen v. Smith* was decided in this court in 1904.) The latter case involved the identical question raised in *Petterson v. Board of Commissioners, supra.* The Texas court again upheld the Texas pilot laws—and did so squarely on the authority of *Petterson v. Board of Commissioners, supra,* which held the deputy provision to be merely directory. The court said:

"The suit was brought by defendants in error, as duly commissioned branch pilots of the port of Galveston, against plaintiff in error, to enjoin him from piloting or attempting to pilot sail vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston, and from acting or assuming to act in any manner as branch or deputy pilot or with respect to such vessels. The decree was for injunction accordingly. The petition alleged in substance: That defendant is not a branch pilot or deputy pilot, but notwithstanding his want of power or right to act, he assumes to act

and does act as such; offers his services to incoming and outgoing vessels, and is occasionally taken on board and employed by them as a pilot, contrary to law; and declares his purpose to continue holding himself out as a pilot, and petitioners believe and aver that his threats of such intended violations of law will be carried into effect, unless he is restrained. That his unlawful acts and conduct, and his avowed determination of persisting therein, have caused and are causing plaintiffs substantial and irreparable injury, and prevent plaintiffs from exercising their official rights and duties as pilots and from earning and receiving the fees and compensation fixed by law and by the board of pilot commissioners of said port. That defendant is insolvent, and plaintiffs have no other adequate remedy than that of injunction. The substance of defendant's answer will appear from the several assignments of error as they are discussed. Demurrers were made to the petition, which were overruled, and plaintiffs' demurrers to the answer were sustained, and decree was entered granting plaintiffs the relief prayed for; the decree reciting that it appeared to the Court that they were entitled to such relief. There is no statement of facts, and we infer that the judgment was rendered on admission to the answer. * * *".

"Under the fourth and fifth assignments propositions are made: (1) 'That the legislature cannot declare a trade, profession, occupation, or business to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness from pursuing such trade, profession, occupation, or business'; and (2) 'the provisions of the statute

which declare a pilot to be an officer, and limit the number of citizens who can serve as pilots to appellees, and such deputies as they may choose to appoint, are void.' The assignments are, in substance, that our statute violates section 1 of the fourteenth amendment of the federal constitution, and section 19, art. 1, of our state constitution, in prescribing the qualifications and regulating the appointment of branch pilots. Upon this subject much might be written. But in view of the universality of such laws, and their long observance and enforcement in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation. Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805. The subject comes fairly within the scope of governmental or police functions. *We consider the case of Petterson v. Board, (Tex. Civ. App.) 57 S. W. 1002, as deciding the question raised by these assignments against the contention of appellant.*" (Italics ours.)

It will be seen that in *Olsen v. Smith, supra*, the Texas court simply adopted the rule announced in *Petterson v. Board of Commissioners, supra*. And as we have pointed out, the basis of the latter decision was that the commissioned pilots do not control appointments, since the deputy provision is merely directory.

In *Olsen v. Smith, supra*, the Texas court went on to say:

"A proposition under the tenth assignment is as follows: 'It is against public policy and illegal for defendants in error, either as officers of the state or individuals, to confederate and conspire against

the plaintiff in error, and to use their means and influence for the purpose of preventing him from becoming a branch pilot, and from pursuing his occupation as a pilot.' This proposition is based on an allegation in defendants' answer, and stricken out, which is as follows: 'That petitioners have been and are now, confederating and conspiring to prevent defendant from pursuing his trade or vocation as a pilot at the port of Galveston, and are using their means and influence to harass and injure him, and also to prevent any change in the statutes of the state regulating the appointment of branch or deputy pilots.' We fail to perceive how this would constitute a defense to a suit for injunction brought by plaintiffs to enjoin defendant from interfering with the exercise of their official duties, or with the emoluments of their office. It was admitted in the answer that plaintiffs were branch pilots, as alleged, and that defendants had not been created a branch or deputy pilot, and that he had been acting and offering to act as pilot to incoming and outgoing British vessels. If so, the injunction was properly granted; and the fact that plaintiffs may be using their combined efforts to prevent any change in the laws, or to prevent plaintiff from receiving appointment as branch or deputy pilot, would not have placed him in any better situation in this proceeding.

"Under the sixth, seventh, and ninth assignments, we find the following proposition: 'The combination of defendants in error, which controls and monopolizes the pilotage at this port of Galveston, and prevents competition, is illegal, in that it is in restraint of commerce among the several states and with foreign nations.' The averment in the answer to which the proposition is applicable is as follows: 'That

petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston, and to lessen their labors, and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement, they prevent competition and monopolize the pilotage at said port of vessels engaged in the transportation of traffic and commerce along the several states and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several states and with foreign nations, and illegal; that the trade, traffic, and commerce passing through the port of Galveston are restrained, hindered, and injured by said combination, and the acts of petitioners, and the fees charged by them.' The state, as already stated, may create the office of pilot. By the same act it has created the office of commissioners of pilots, who decide upon the qualifications of applicants for branch or deputy pilots, and who recommend to the governor, where appointments are proper, such as are meritorious, etc. They may, for sufficient cause, upon hearing, suspend a pilot or deputy; and the governor has power, at will, to remove or reinstate one. The entire subject is under the control of the governor and the commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an office is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and com-

bine, this might be conduct that would suggest their removal by the governor, or be cause for suspension by the commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to perform its duties, or to protect themselves in its emoluments."

The decision of this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52, upholding the decision of Texas Court of Civil Appeals, amounts to nothing more than an affirmance of the doctrine first announced in *Petterson v. Board of Commissioners, supra*, to the effect that, since the deputy provision of the Texas law is merely directory, the statute is not unconsfitutional. This court said:

"The defendants in error, who were plaintiffs in the Court of original jurisdiction, as the duly licensed state pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendants in offering, when he was not authorized by law to do so, his services to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston. An injunction was prayed restraining the defendant from acting in any manner as branch or deputy pilot, or pilot under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified. The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the de-

fendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. 68 S. W. Rep. 320. The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was then transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was affirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, his writ of error was prosecuted to the latter court.

"The defense raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, 'a board of five persons of respectable standing, to be known as commissioners of pilotage'. Upon this board power is conferred to fix, within the maximum limits provided by law the charges to be made by branch and deputy pilots for their services, to regulate the manner in which

such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803. * * *"

"It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage service, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no

monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judiically afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

We find no fault with *Olsen v. Smith, supra,* and *Petterson v. Board of Commissioners, supra.* It is plain that the decisions would have been different had the deputy provision of the Texas statute been mandatory. We repeat that the decision supports the appellants.

It is conceded that the apprentice provision in the Louisiana statute is mandatory. The Supreme Court of Louisiana so held, saying:

"Plaintiffs ask the court to do those things because they allege that the Crescent River Port Pilots Association (organization of commissioned pilots), a private organization created under the terms of the act, selects its own apprentices, as it is authorized to do under the statute. But the Court can not comply with plaintiffs' request without creating in lieu of a constitutionally enacted statute a ruling of its own, based upon the alleged hardship arising out of the selection by the Crescent River Port Pilots As-

sociation of the apprentices who might thereafter become members of the organization. This the Court can not do. The justice or injustice of the statutory provision permitting the River Port Pilots Association to select apprentices is a question for the Legislature and not for the Court."

Again, the court said:

"There is nothing in the law which requires the Crescent River Port Pilots Association to admit to membership persons not of their selection. If an apprenticeship must be served under pilots who are members of the association, because as a practical matter it may not be served otherwise, there is nothing in the law which forbids this situation to arise."

The court is correct—the apprentice provision is clearly mandatory. The act states that "upon the certificate of the Board to the governor that the applicant has complied with the provisions of this act, the governor may, in his discretion, appoint to existing vacancies". The governor can make no appointment except upon the board's certificate. And by the provisions of the act "no applicant shall be considered by said Board, unless he * * * shall have served six months apprenticeship in his proposed calling." Note, it is not six months pilot experience, simply, that it required—"apprenticeship in his proposed calling" is required. "Apprentice" is defined in Funk & Wagnall's dictionary thus: "One who is bound by indenture to serve another in order to learn a trade or business."

As a matter of fact, the appellees concede that the apprenticeship provision in the statute is mandatory.

Of course, piloting is subject to regulation, being vested with public interest. We contend only this: The regulation must not be arbitrary or discriminatory. We do not say that the appellants have an *absolute right* to be pilots. We do say, though, that they are entitled, equally with all others, *to be considered* for appointment. The equal protection clause of the Fourteenth Amendment entitles them to that opportunity. Under the law in force in Louisiana if the governor should desire to appoint the appellants he could not do so,—he could not even consider their application. The commissioned pilots themselves name those who may be considered, by naming the apprentices. Clearly, this statute is repugnant to the equal protection clause of the Fourteenth Amendment.

If the apprentice provisions in the Louisiana statute were merely directory—as is the deputy provision in the Texas law—the appellants then would have no complaint. They might simply present their applications to the governor. They might lay before him the facts alleged in their petition: that they are well qualified, each having had more than 15 years pilot experience; and that to bar them now from the port, when they heretofore have been cornered, so to speak, within its limits, and thereby put them entirely out of business, would be grossly unfair. They could present a very strong case to the governor.

The Louisiana Supreme Court upheld the statute as a valid exercise of the "public powers" of the state. The court said:

> "It is indisputable that the right to follow any of the ordinary occupations of life is one of the

> privileges of citizenship, and this includes the right to pursue any lawful occupation without statutory restrictions except such restrictions as may be applied to all persons pursuing the same occupation under the same conditions. But it is also indisputable that there are certain occupations in which the public has such interest as will make those occupations subject to statutory regulations, or even prohibition. The constitutional provisions on which plaintiffs rely were not designed to interfere with the public powers of the State."

Apparently, it is the court's view that the power to regulate carries with it the power to discriminate. But of course that is not correct. The medical and legal professions are subject to regulation. Certainly a law giving a group of physicians or attorneys the power to control their professions, through an apprentice provision, would not be upheld. No different rule should prevail with respect to piloting. Medicine and law are as thoroughly invested with public interest as piloting. The medical and legal professions are as old if not older than piloting. The commission issued to a pilot is nothing more than a certificate of competence and is not different in character from the certificates required of physicians and attorneys. In *Houston Pilots v. Goodwin*, 178 S. W. 2d 308, (1944), the Supreme Court of Texas said exactly that:

> "Doubtless everywhere pilots are licensed to practice pilotage only in particular waters, and only after they have passed an examination as to their competence therein. In Texas the license issued to pilot is issued to him as 'branch pilot' of a particular port. And such license is referred to in the statutes as though it were a commission which invests such

branch pilot with an office. Art 8270, et seq., relating to pilots of seaports; Art. 8248, et seq., relating to pilots of ports of navigation districts. The language of such statutes is misleading, for *the 'commission', which licenses a pilot to practice pilotage as the branch pilot of a particular port is merely a certificate of competence, and does not differ in character from certificates of competence required of lawyers or doctors before they are permitted to practice law or medicine.*" (Italics ours.)

It is not surprising, considering the fact that the commissioned pilots have airtight control, that a "family organization" has developed under the administration of Act 54 of 1908 as amended. The petition shows that in 1938 and 1944, the last times that appointments were made, of the 15 appointed 12 were related to then commissioned pilots or to predecessor pilots; and that of the 41 present commissioned pilots, 34 of them are related to other pilots or predecessor pilots. It is not necessary to speculate on what could or might happen under this law—the facts are before us.

The Supreme Court of Louisiana said in this case:

> "The services in which pilots are engaged is one of great importance, frequently full of hardship and sometimes of peril and, regardless of time and weather conditions, they must be in their places ready to perform the duties of their vocation."

But the considerations there mentioned do not overbalance the Constitution. Too, under the federal law governing coastwise vessels, all applicants have equal opportunity for license, and there is no suggestion that coast-

wise navigation does not function properly. The hardships and perils and conditions mentioned above confront pilots of foreign and coastwise vessels alike. Pilots of foreign vessels face no hardships or perils or conditions that are not faced by pilots of coastwise vessels. There is no difference whatever between the duties and responsibilities of pilots of the two classes of vessels. The classes do not differ as to size, capacity, tonnage, or the like. As a matter of fact, some vessels sometimes sail in coastwise trade under enrollment and other times under registry in foreign trade. Pilots capable of handling an enrolled or coastwise vessel are equally capable of handling registered or foreign vessels. The vessels follow the same course on the Mississippi. We mention this to demonstrate that no reason—practical or otherwise—can be found for a discriminatory law governing foreign shipping.

As stated, *Olsen v. Smith, supra,* was decided in this court in 1904. There is later jurisprudence on this subject, in which *Olsen v. Smith, supra,* is considered,—and the decision has not been given the interpretation placed upon it by the appellees.

State v. Board of Pilotage Commissioners, 198 Wash. 695, 90 P. 2d 238, is similar in principle to this case. The defendant, Board of Pilotage Commissioners, had closed the doors to all applicants for pilot licenses except those of its own selection. The court held that according to the terms of the statute in question the board had no right to limit the number of pilots and ordered the board, by mandamus, to examine the relator pilots. In the course of the opinion the court said, emphatically, that any statute

would confer upon a pilot board the arbitrary right to license one applicant and refuse to license another, although equally qualified, would be unconstitutional. The court said:

> "It may be conceded that an administrative board, such as respondent, has considerable discretion in carrying out its duties, and that, as a general rule, such discretionary powers are not subject to review by the courts. This is not, however, a universal rule. If the action of the board is arbitrary or capricious, or was prompted by wrong motives, there is not only an abuse of discretion, but, in contemplation of law, there has been no exercise of the discretionary power, and in such cases the law will, by mandamus, compel the tribunal to act honestly and fairly. State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 P. 1064.
>
> "We agree with respondents that the court may not substitute its judgment for that of the board, and direct that licenses be issued to appellants, or to any particular person, or that any definite number of pilots be licensed, or fix any definite time when examinations shall be held, or prescribe the general conditions under which such examinations shall be conducted. However, we believe there are certain duties required of respondents by the act, which are mandatory, and in which respondents have no discretion. We think it is mandatory that the board provide for competitive examinations; that they permit such examination to be taken by any person whose application, showing him to have the statutory qualifications, together with the statutory fee, is on file with the board at the time such examination is given; and that licenses be issued only

after examinations have been taken, and then only to applicants having the qualifications prescribed by the statute.

"We are clearly of the opinion that appellants Landstrom and Jensen should have been permitted to take the examination on June 11, 1935, and that for the benefit of these two appellants at least, the board should be compelled to hold an examination.

"Appellants contend that, if a fair and reasonable construction is given to the act, it would violate no constitutional provision, but that it would violate both article 1, S. 12, of the state constitution, and the fourteenth amendment of the Constitution of the United States, U. S. C. A., if construed as contended for by respondents, to the effect that the board is therein given authority to issue a license to any applicant they may believe to be qualified, regardless of whether or not he has taken an examination, or has the qualifications prescribed by the statute, and that it gives the board the right to limit the number of licenses issued.

"*We agree with appellants that the act would be unconstitutional if given the construction contended for by respondents, in that it would leave to the board the right to determine to whom licenses should be issued upon a personal basis, at the will and pleasure of the board and not upon any basis prescribed by the legislature. It would vest in the board arbitrary power to license one applicant and refuse to license another, although qualified in every respect.* Seattle v. Gibson, 96 Wash. 425, 165 P. 109; State ex rel. Makris v. Superior Court, 113 Wash. 296, 193 P. 845, 12 A. L. R. 1428; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220;

> People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305. *All of the foregoing cases were rested upon the principle that an ordinance which authorizes the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is perfectly lawful, and commits to any officer or set of officers the power to decide, according to their own notions in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the fourteenth amendment of the Constitution of the United States.* In S. 12, of article 1, of our state constitution, we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." (Italics ours.)

The Supreme Court of Louisiana in this case approved the ruling in *State vs. Board of Commissioners, supra.* There the court said, as will be noted, that a law giving a pilot board authority to discriminate would be unconstitutional. Under the Louisiana statute the pilots themselves control the appointments. The case here is far worse than the case where a pilot board is given power to discriminate. It is one thing to have a board control appointments but far worse to vest that authority in the pilots themselves. For they have a selfish motive to serve—they can admit those of their own selection and exclude others. But the result is the same whether the

discrimination results from board action and from the action of pilots themselves. Outsiders are prohibited from engaging in the trade or calling. Here is no less a denial of equal protection.

The court's comment, in *State v. Board of Pilotage Commissioners, supra,* on *Olsen v. Smith, supra,* is interesting. The court interpreted the latter decision as holding merely that a state may regulate pilotage by giving the governor the power to appoint—which in fact is the true doctrine of that case. In *State vs. Board of Pilotage Commissioners, supra,* the Court said:

> "In the Olsen case, supra, the constitutionality of a pilotage act of the state of Texas was questioned, on the theory that the legislature had no right to attempt to regulate pilotage service, as it was not subject to governmental control. This act conferred upon the governor of the state of Texas the authority to appoint any number of branch pilots that might from time to time be necessary."

In *State v. Turner,* 143 Fla. 424, 196 So. 816, (1940), the pilot commissioners attempted to control the stevedore business within the port, by licensing only such firms as it chose. The court held against the board, saying:

> "Under Section 3860, C. G. S., a pilot commission has authority to limit the number of licenses granted with due regard to the business of the port. *But if this section 19, of Article 9 of Chapter 17506 is to be construed as vesting in the Port Authority acting as a Pilot Commission authority to license or refuse to license competent and reliable contracting stevedores at their pleasure, or to place in their li-*

censes such limitations or restrictions as they may see fit as to the particular owners or masters of vessels with whom they will be permitted to do business, or at their pleasure to permit one stevedore to operate at the Port while another equally qualified is denied, said section 19, so construed, would come in conflict with sections 1 and 12 of the Declaration of Rights and the Fourteenth Amendment to the Federal Constitution. As was said in Maxcy v. Mayo, 103 Fla. 552, 139 So. 121, 129:

"'It has long since become an established rule of constitutional law in these United States that power and discretion, however exerted, and by whomsoever exercised, must be used in such manner as not to infringe upon or impair the fundamental rights of life, liberty, property, and the pursuit of happiness. The very idea (as one opinion delivered by the Supreme Court of the United States puts it) that one man may be compelled to hold his life, business, property, means of living, or any material thing essential to his enjoyment of life, at the mere will of another, is intolerable in any country where freedom prevails, and is the very essence of slavery itself. Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.'

"See, also, Ellis v. Thiesen, 78 Fla. 47, 82 So. 607; State ex rel. Pittman v. Barker, 113 Fla. 865, 152 So. 682, 94 A. L. R. 1481; State ex rel. Kennel Club, Inc., v. State Racing Commission, 116 Fla. 143, 156 So. 317; State ex rel. Kennedy v. Knott, 123 Fla. 295, 166 So. 835; State ex rel. Tullidge v. Hollingsworth, 103 Fla. 801, 138 So. 372.

> "The Port Authority acting as a Pilot Commission has not denied the competency and integrity of the relator Stevedoring Company but has admitted it by offer to give it a permit to handle the cargoes for two lines. Indeed, such admission was made each time they issued the licenses to the relator and accepted the $100 annual permit fee, during the years 1934 to 1938." (Italics ours.)

There is no difference in principle between the case where the rights of a contracting stevedore are involved and the case involving the rights of applicants for pilot licenses. The stevedoring business is vested with public interest very much as is piloting. It is important to the safety of the ship that it be properly loaded. In *State v. Turner, supra*, the court took occasion to remark:

> "It is further pointed out that the duties of a contracting stevedore at a great port like Port Everglades, or any other port of this State, are important, the responsibility is grave, and that the proper performance of his work may determine whether the vessel loaded by him can make a safe voyage."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, this court said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their

administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this Court in Henderson v. Mayor, etc., of New York, 92 U. S. 259 [Bk. 23, L. ed. 543]; Chy Luny v. Freeman, 92 U. S. 275 [Bk. 23, L. ed. 550]; Ex parte Va., 100 U. S. 339 [Bk. 25, L. ed. 676]; Neal v. Delaware, 103 U. S. 370 [Bk. 26, L. ed. 267], and Soon Hing v. Crowley [supra]." (Italics ours.)

The court held in *Yick Wo v. Hopkins, supra,* that a law enacted "with an evil eye and an unequal hand" violates the Fourteenth Amendment. With that principle in mind let us consider this law and particularly the 1942 amendment. The petition shows that the original law,

Act 54 of 1908, was administered always for the benefit, exclusively, of the favored commissioned pilots. Knowledge of the facts in that connection is charged to the legislature. The legislature in 1942 came along and placed the port within their exclusive domain—knowing that no pilot except those having the favor of the commissioned pilots had a chance of being commissioned. We say that both the original act and the 1942 amendment were passed "with an evil eye and an unequal hand". Certainly the 1942 amendment was so enacted.

In *Ring v. Patterson*, 170 Or. 234, 1 P. 2d 1105, (1931) the plaintiff pilot alleged that the pilot board was controlled by a pilot organization. The court found as a fact that the board was not so controlled. The court said however that it is illegal for a board to be so controlled:

> Evidently recognizing the above principles of law, the petitioner sought to bring himself within an exception by charging that the commissioners had given themselves over to the control of the Columbia River Pilots' Association, had refused to grant him a license unless he would become a member of that organization, and unless the association favored his application. He relies upon the statement of the exception contained in 38 C. J., Mandamus, p. 598, S. 74, where the writer states that the writ may issue when the discretion of the quasi-judicial officer has been abused. In the determination of this issue of fact we feel justified in resorting to the presumption that official duty has been regularly performed (section 9-807, Oregon Code 1930), which of necessity includes a disputable presumption that the public officer has reasonably exercised his discretionary power. New York ex rel. Van De

Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424. We have carefully read the testimony taken before the referee and have examined all of the exhibits introduced in evidence, but fail to find that a preponderance of the evidence indicates that the commissioners have subjected themselves to the dictates of the Columbia River Pilots' Association. The issue is one of fact only, and since no purpose would be served by an extended statement of our review of the evidence, we content ourselves with a statement of our finding that a preponderance of the evidence fails to substantiate petitioner's charge."

See also *Zucht v. King*, 260 U. S. 170, 67 L. Ed. 191.

In *Williams v. Molther*, 198 Fed. 460, (1912), the court had this to say in respect to the federal law:

"*While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it.* The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well

by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent fom obtaining a license. *Moreover, as we stated in our previous opinion, 'such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers'.*" (Italics ours.)

Note the court's reference to "dangerous monopoly". It would be difficult to imagine a tighter monopoly than that maintained by the port pilots in Louisiana.

In *Williams v: Pope*, 215 Fed. 1000, (1914), the court had this to say in a case involving the federal pilotage law:

"In my opinion, complainant's failure to take an appeal from the determination of the local inspectors is fatal to his cause of action, unless he can show that there was a conspiracy among the defendants and the supervising inspector to refuse him a pilot's license notwithstanding his fitness to properly fill the position of pilot. But the existence of a conspiracy to injure the complainant or to wrongfully deprive him of a license, though averred in the bill, is not shown, nor is there any evidence whatever of bad faith or ulterior motive on the part of the local inspectors in the discharge of their official duties in denying him a license. The inspectors apparently acted in perfect good faith throughout his examination, conscientiously determining his percentage."

The general rule on the subject is stated in *Corpus Juris Secundum*, Volume 16, Section 659, page 1390, thus:

> "The constitutional guaranty of due process is not violated by the fact that the granting of licenses is committed to administrative officers, who, within certain limitations prescribed by law, are authorized to exercise their discretion in the granting or refusing of licenses to particular persons or corporations, but *it is otherwise where an official or board is invested with authority to grant or withhold a license according to his or their arbitrary discretion.*" (Italics ours.)

City of Seattle v. Gibson, 96 Wash. 425, 165 P. 109, states the rule thus:

> "We have no doubt of the right of the city to require certain qualifications of applicants, not inconsistent with state law, and to provide how those qualifications may be determined, but *it may not say, by special act, that one person, or set of persons, may engage in any particular lawful calling to the exclusion of all other persons. Persons equally qualified are entitled to the same privileges under the law, and a statute or an ordinance is void which interferes with or abridges the privileges and immunities of citizens who are equally entitled to the protection of the law.* There can be no reasonable escape from the conclusion that this ordinance provides for a discretion which is purely arbitrary, and, therefore, an illegal method of determining who shall and who shall not be granted a license to conduct a drug store or pharmacy." (Italics ours.)

In *Highland Farms Dairy v. Agnew*, 16 Fed. S. 575, (1936), the court had this to say in passing on a law that provided for the appointment of a milk commission:

> "Nevertheless it is not inappropriate to point out that *the license provisions of the Act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable construction can be adopted. Such a grant of power would be invalid*, and the attempt to exercise it arbitrarily would be restrained by a court of equity as a violation of the due proces clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U. S. 356; People of State of New York ex rel. Lieberman v. Van DeCarr, 199 U. S. 552; Douglas v. Noble, 261 U. S. 165; Lehman v. State Board of Public Accountancy, 263 U. S. 394." (Italics ours.)

In *Lieberman v. Van DeCarr*, 199 U. S. 552, 26 S. Ct. 144, this court said, in passing on a sanitary code of New York City:

> "Such regulations, however, should be uniform, and the Board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer (in a lawful commodity) and refuse a license to another similarly situated, undoubtedly it would be invalid."

We submit that the motion filed by the appellees to dismiss the appeal in this cause, or in the alternative, to affirm, should be overruled.

Respectfully submitted,

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This is to certify that copies of this brief have been served on Arthur A. Moreno, Attorney for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 291

MARION KOTCH, ET AL.,
Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,
Appellees.

BRIEF ON BEHALF OF THE APPELLANTS.

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BRIEF ON BEHALF OF THE APPELLANTS.

REFERENCE TO OFFICIAL REPORT OF THE OPINION DELIVERED BY THE COURT BELOW.

The opinion of the Supreme Court of Louisiana in this cause is reported: 209 La. 737, 25 So. 2d. 527.

STATEMENT AS TO JURISDICTION.

In this suit, filed in the district court of Orleans Parish, Louisiana, the plaintiffs, appellants here, attacked the constitutionality of the Louisiana pilot law, Act 54 of 1908 of the Louisiana Legislature, as amended by Act 134 of 1942, on the ground that it violates the Fourteenth Amendment of the Constitution of the United

States. The suit was brought against the Board of River Pilot Commissioners for the Port of New Orleans, created by the act, and against the individual members of the board. The district court held the act to be constitutional, dismissing (R. p. 23) the plaintiffs' suit on an exception of no cause of action filed by the defendants. The plaintiffs appealed to the Supreme Court of Louisiana, the highest court of the State, and that court affirmed (R. p. 4) the judgment of the district court.

Jurisdiction of the Supreme Court of the United States in this cause is sustained by Section 344(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE.

The question presented by this appeal is purely one of law. The plaintiffs' suit was dismised (R. p. 22) in the state court on an exception of no cause of action filed by the defendants. By the law of Louisiana, all well-pleaded allegations of fact are admitted in considering an exception of no cause of action *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 3d. 233; *Jones v. Saucier*, 203 La. 744, 14 So. 2d. 775; *In Re Nunez*, 203 La. 847, 14 So. 2d. 680. The exception of no cause of action in Louisiana is similar to the demurrer at common law.

Act 54 of 1908, as amended by Act 134 of 1942, undertakes to regulate pilotage on the Mississippi River. The original law, Act 54 of 1908, conferred upon pilots commissioned thereunder the exclusive right of piloting vessels engaged in foreign trade from the Passes at the mouth of the Mississippi *to* the port of New Orleans. Act 134 of 1942 amended the 1908 by extending the commissioned pilots exclusive jurisdiction to include the port itself.

It should be borne in mind that piloting of vessels engaged in coastwise trade is regulated by an act of Congress (Rev. St. U. S. #444, U. S. Camp. St. 1901, p. 3037), and hence is not subject to state regulation. *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52. It follows therefore that Act 54 of 1908, as amended, applies exclusively to foreign trade vessels.

The appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, instituted this suit (R. p. 17) against the Board of River Port Pilot Commissioners for the Port of New Orleans and the individual members of the Board to have Act 54 of 1908, as amended by Act 134 of 1942, declared unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. They sought, in the alternative, to have the 1942 amendment alone declared unconstitutional on that ground. And they asked, again in the alternative, that if the act and

amendment be held valid, then that the defendant board be ordered by mandamus to examine them on their qualifications as pilots, and finally to certify them to the governor for appointment.

The plaintiffs, appellants here, alleged (R. p. 17) in their petition: that they are licensed river pilots holding first class licenses from the United States Government; that they are well qualified, having been actively engaged as pilots—on the Mississippi River and other waters but principally on the Mississippi—for more than 15 years; that Act 54 of 1908 confers upon the defendant board and on the commissioned pilots themselves absolute power in respect to appointments—the act declares that "no applicant shall be considered by such board unless he * * * shall have served 6 months apprenticeship in his proposed calling", and at the same time gives the commissioned pilots the right to name the apprentices; that hence only those having the favor of the pilots themselves may be commissioned; that a tight monopoly has resulted—in 1938 and 1944, the last times appointments were made, of the 15 appointed, 12 were related to then commissioned pilots or predecessor pilots, and of the 41 present commissioned pilots, 34 of them are related to other pilots, or to predecessor pilots; that in the past the plaintiffs have centered their activities largely to the port itself—being barred by Act 54 of 1908 from piloting foreign trade vessels below the port's limits; that coastwise shipping represents only a minor part of the business on the Mississippi—far too small for them

to earn a livelihood from that source alone; that the 1942 amendment, closing the port to them, will force them to give up their occupation as pilots and seek other pursuits.

The judge of the district court maintained the defendants' exception of no cause of action and dismissed the plaintiffs' suit. The Supreme Court of Louisiana affirmed the judgment on appeal. And the appeal to this court was then taken.

SPECIFICATION OF ASSIGNED ERRORS.

(1) Act 54 of 1908, as amended, is unconstitutional violating the Fourteenth Amendment of the Constitution of the United States. In particular, it violates the equal protection clause of the Fourteenth Amendment in that it gives to the pilot board and the commissioned pilots absolute control of appointments. The Supreme Court of Louisiana erred in holding the act constitutional.

(2) Act 54 of 1908, as amended, is unconstitutional, as stated above, on its face. Further, the act has been administered always in an arbitrary, unfair and discriminatory manner, and even assuming *arguendo* that the act is not unconstitutional on its face, the denial of justice is still within the prohibition of the Fourteenth Amendment, under the doctrine of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. The Supreme Court of Louisiana erred in holding otherwise.

(3) The Supreme Court of Louisiana rested its decision in this case upon the ruling of this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52. That case does not support Act 54 of 1908, as amended, and the Supreme Court of Louisiana erred in holding that it does.

ARGUMENT.

Act 54 of 1908 as amended is clearly unconstitutional. It gives the commissioned pilots airtight control of appointments. It is plain that the act was drawn with that purpose in view. Section 1 creates the Board of River Port Pilots for the Port of New Orleans; Sections 2 and 3 provide for the appointment by the governor of the first group of pilots—28 in number; and Section 4 declares that "whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examination", and states that "no applicants shall be considered by said board *unless he * * * shall have served six months' apprenticeship in his proposed calling.*" (Italics ours.)

No one may be considered for appointment unless he first serves as an apprentice to a commissioned pilot. The pilots name the apprentices, of course. Thus they control all appointments. The case is just that simple.

Sections 1, 2, 3 and 4 are quoted below:

> "Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Governor shall appoint, by and with the advice and consent

of the Senate, three (3) citizens who shall form the Board of River Port Pilot Commissioners for the port of New Orleans. The first commissioners shall be appointed from those pilots who have for at least one year immediately preceding the passage of this act, exercised the functions of river pilots, from the head of the Passes to the port of New Orleans upon sea-going vessels; and thereafter said appointments shall be exclusively made from river port pilots by virtue of this act commissioned. The Governor, in appointing said commissioners, shall designate the president of the Board. Said commissioners shall be removable by the Governor for cause, and shall qualify by taking an oath of office.

"Section 2. That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return. There shall be twenty-eight (28) such pilots, appointed and commissioned by the Governor immediately upon the promulgation of this act.

"Section 3. That the first twenty-eight (28) river port pilots hereinbefore provided for in Section 2, shall be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels from the head of the Passes to the port of New Orleans and return, and thereafter there shall not be less than twenty such pilots.

"Section 4. That whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall

> have provided, with the Governor's approval, provided that *no applicant shall be considered by said Board, unless he* submits proper evidence of moral character and is a voter of this State, and *shall have served six months' apprenticeship in his proposed calling,* and upon the certificate of the Board of the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies." (Italics ours.)

The apprentice provision is plainly mandatory. The act states that "upon the certificate of the Board to the governor that the applicant has complied with the provisions of this act, the governor may, in his discretion, appoint to existing vacancies". The governor can make no appointment except upon the board's certificate. And by the provisions of the act "no applicant shall be considered by said Board, unless he * * * shall have served six months apprenticeship in his proposed calling". Note, it is not six months pilot experience, simply, that is required—"apprenticeship in his proposed calling" is required. "Apprentice" is defined in Funk & Wagnall's dictionary thus: "One who is bound by indenture to serve another in order to learn a trade or business."

In its opinion the Supreme Court of Louisiana acknowledged that the apprentice provision is mandatory. The court said (R. p. 16):

> "Plaintiffs ask the court to do those things because they allege that the Crescent River Port Pilots Association [organization of commissioned pilots], a private organization created under the terms of the act, selects its own apprentices, as it is authorized

to do under the statute. But the Court can not comply with plaintiffs' request without creating in lieu of a constitutionally enacted statute a ruling of its own, based upon the alleged hardship arising out of the selection by the Crescent River Port Pilots Association of the apprentices who might thereafter become members of the organization. This the Court can not do. The justice or injustice of the statutory provision permitting the River Port Pilots Association to select apprentices is a question for the Legislature and not for the Court."

Again the court said (R. p. 13):

> "There is nothing in the law which requires the Crescent River Port Pilots Association to admit to membership persons not of their selection. If an apprenticeship must be served under pilots who are members of the association, because as a practical matter it may not be served otherwise, there is nothing in the law which forbids this situation to arise."

The Supreme Court of Louisiana upheld the statute though acknowledging that it confers upon the commissioned pilots absolute control of appointments, by virtue of the apprentice provision. The court rested its opinion on the decision of this court in *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224, 25 S. Ct. 52. The Supreme Court of Louisiana said (R. p. 9):

> "The leading and controlling case on the subject is Olsen v. Smith, 195 U. S. 332, 25 S. Ct. 52, 55, 49 L. Ed. 224. There the Supreme Court of the United States announced the principles that should be applied in determining the constitutionality of

legislative acts regulating pilotage. In that case, the constitutionality of an Act of the Legislature of the State of Texas regulating the business of pilotage was sustained. The Texas law, like the Louisiana law, provided that the Governor should appoint a board to which was granted the power of fixing charges, regulating the manner in which the pilot should perform their duty, examining them as to their qualifications, hearing complaints against them and, if the occasion required, to suspend them until the Governor should act. The authority was conferred upon the Governor to appoint such number of branch pilots as might from time to time be necessary, each of whom should hold office for two years, subject to removal by the Governor at pleasure. Anyone who was not duly commissioned was prohibited from engaging in the business of pilotage so far as the statute provided for rendering of pilotage services by the duly appointed pilots. The only difference between the Texas law and the Louisiana law is that the Board of Pilot Commissioners under the Louisiana law is composed of three members, whereas the Texas board is composed of five members. The nature of their powers and duties is substantially the same. The term of appointment under the Texas law is for two years. Under each statute, however, the pilots so appointed are subject to removal by the Governor at pleasure. The Supreme Court of the United States, speaking through Mr. Justice White, later Chief Justice, and formerly a Justice of this Court, held that no inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed. And further, since the State, under

its power to regulate, has the right to appoint and commission pilots, no monopoly or combination can arise from the fact that the authorized agents of the State are alone permitted to perform the duties with which they are charged under the law. After discussing these propositions, Justice White remarked as follows: 'When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion,—which we do not at all imply is the case,—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises'. And so we may remark here, if the statutes in question are unwise the remedy lies with the Legislature in whom the ultimate authority on the subject is vested and not with the court to deny the right of the power of the State to exercise its authority over a matter wholly within its control."

The Supreme Court of Louisiana is in error. *Olsen v. Smith, supra,* does not support the appellees. The jurisprudence, involving the Texas pilot law which was considered in *Olsen v. Smith, supra,* and which culminated in that decision, actually supports the positions of the appellants.

To understand *Olsen vs. Smith, supra,* the jurisprudence leading up to that decision must be reviewed.

The Texas pilot law was first attacked in *Petterson v. Board of Commissioners*, (Tex. Cir. App.), 57 S. W. 1002, decided in 1900. Article 3792 of the Revised Statutes of Texas gave the pilot board authority "to establish a term of probation not exceeding one year, as a deputy pilot". In *Petterson v. Board of Commissioners, supra*, the constitutionality of the Texas law was attacked on the same ground that Act 54 of 1908 as amended is here attacked, namely, that it gave the commissioned pilots the right to control all appointments. In *Petterson v. Board of Commissioners, supra*, the court upheld the Texas law. But it did so only after holding that the deputy provision in the statute is *directory*. The court held that under the Texas law the commisioned pilots do not control the appointments since the provision requiring service as a pilot deputy is directory and might be ignored by the governor. The court inferred plainly that the statute would be unconstitutional if the deputy provision were mandatory.

The distinction between the Act 54 of 1908 as amended and the Texas pilot law is plain. The apprentice provision in the Louisiana pilot law is mandatory. The Supreme Court of Louisiana so held. And counsel for the appellees concede that to be true.

We shall quote from *Petterson v. Board of Commissioners, supra*, at length—so that Your Honors will have a clear understanding of the ruling there made. *Olsen v. Smith, supra*, does nothing more than affirm its doctrine, as we shall point out hereafter. In *Petterson v. Board of Commissioners, supra*, the court said:

"Then follows an allegation that there are only 11 branch pilots in service at the port; that they have unlawfully asociated themselves together into a co-partnership under the name of 'Galveston Pilots' Association', for the purpose of monopolizing and controlling the pilotage of the port, and have so acted for several years; that they refuse to appoint any one as deputy who will not agree to act under and subordinate to the rules, orders and regulations made by the association; that the refusal of appellees to examine any one except such as have been appointed by the present branch pilots as a deputy pilot, and the refusal of said pilots' association to deputize petitioner or any one else who desires to work in competition with said association, creates a monopoly in favor of the existing pilots, contrary to law, and against the rights of petitioner.

"The articles of the Texas statutes (Rev. St.) bearing upon the subject provide as follows:

"Article 3790: 'The governor shall appoint, with the consent of the senate for each port whose population and circumstances shall warrant it, * * * a board of five persons of respectable standing under the denomination of "commissioners of pilots"'. The remainder of the article prescribes their qualifications, etc., and empowers the governor to suspend, fill vacancies, etc.

"Article 3791 provides that 'the board of commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they may find already appointed at the time of their organization;

and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the governor, where new appointments are proper, such as are meritorious, and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized after due hearing of accusation testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office. The governor, however, shall have power at his will and pleasure to remove any branch pilot or to reinstate any one who has been so suspended.'

"Article 3792 provides that the board of commissioners 'shall require a certain term of residence in the state of Texas to authorize any person to exercise the functions of a branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year as a deputy pilot before any person can exercise the functions of his office.'

"Article 3793 provides: 'The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix the rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the

board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution.'

"Article 3794 provides: 'The board shall be authorized and required to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services * * * as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master * * * when such pilot might have been landed.' The remaining portions of this article fix the maximum of such compensation, and provides for appeals from the judgments of the board in such cases.

"By article 3796 the governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term only.

"By article 3797 branch pilots are required before entering upon the duties of their office, to enter into bond with sureties in the sum of $5,000, payable to the governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond is to be approved by the board of commissioners, and filed with the secretary of state. The oath of office prescribed by the constitution is also required to be taken and subscribed by each pilot, such oath to be indorsed on the back of the bond, and together with the bond, is to be recorded in the county of the port before being forwarded to the governor.

"Under article 3798, each branch pilot may appoint two deputies, subject to examination and approval by the board, and a pilot appointing a deputy without such approval forfeits his own appointment. The board is also clothed with authority to restrict all deputy pilots from piloting vessels over a certain draught.

"Article 3799 provides the penalties of suspension and dismissal for certain named acts of malfeasance.

"Article 3800 fixes the rate of pilotage upon classes of vessels subject thereto, and provides that the master of a vessel refusing the services of a pilot shall be liable to such pilot for half the rate of pilotage which he would have earned if accepted.

"Article 3803 prescribes a penalty of $50 against any unauthorized person acting as branch pilot, such penalty to be recovered at the suit of any duly-authorized branch pilot, brought in any court of competent jurisdiction.

"The above articles are believed to be all of the Texas pilotage laws which have any bearing on the questions raised on this appeal, or which are necessary to be discussed in this opinion.

"The trial court seems to have held the petition insufficient to show the plaintiff entitled to the writ, (1) because under the law the position of branch pilot is an office to which the governor has the power, in his absolute discretion, to appoint such persons, and such a number of persons, as he may consider necessary for the needs of the port, and

the petition does not show that the governor has thought it necessary to appoint a greater number than are now in service; (2) these appointments are required under the law to be made from the class of persons who have complied with the requirements as to residence in the state for the time fixed by the commissioners, and as to service as deputy pilot for the time fixed by them, and the petition does not allege the plaintiff to be one of that class.

"Appellant's first, second, fourth, fifth, and sixth assignments of error are thus interpreted by his proposition thereunder: 'When a skilled seaman, who is by education, training and experience mentally, morally, and physically qualified to act as pilot for the port of Galveston, applies to the commissioners to be examined as to his qualifications to act as branch pilot, the board should examine the applicant, notwithstanding the fact that he has never been appointed or served as deputy pilot for the port.' Under this appellant contends that the provision empowering branch pilots to select two deputies, and providing that no person who has not served the requisite term as deputy can become a branch pilot, is inoperative—First, because the article undertaking to empower the board to fix a term of probation for deputy pilots is void for uncertainty, and if not void for uncertainty is merely directory and if not void nor merely directory is unconstitutional, because it places it in the power of pilots already servicing to continue themselves in office or become their own successors by refusing to appoint deputies, or by discharging those appointed before the time of probation expires; second, the law, construed as a whole clearly requires the board to examine and report upon every appli-

cant, in order that the governor, in his discretion, may appoint such persons, and such number, as the needs of the port may require, and thus accomplish the objects contemplated by the law.

"While the latter clause of article 3792 is of faulty construction, we do not believe it can be held to be void for uncertainty. The sense of it seems to us very plain; and the defect complained of is so insignificant and obscure that a casual reading of the article does not disclose it. We do not deem it necessary to follow counsel for appellant in his discussion of the rules of construction. The article has stood unchanged since 1846, the date of its passage. So far as we are able to ascertain, the construction placed upon it has been uniform. No one has been misled by the defective phrase, 'as also to', etc. It is not a statute which has only occasionally been called into force, but has been an active, operative statute by which the boards of pilot commissioners have been controlled, and under which the important service of pilotage has been conducted. If a graver reason were urged, the court might well hesitate to hold a statute void for uncertainty which has for so many years received a common and uniform construction, and has answered the purposes for which it was passed. If, as contended by appellant, the provision is merely directory, we fail to perceive in what respect appellant could be benefited by such a holding. Directory statutes are not void, nor may they be suspended for that reason at the suit of an individual. The question usually arises when the validity of some official act is called in question on the ground that the statutory prerequisites have not been performed. If the statute is mandatory, the official act is invalid; if directory

merely, the act may nevertheless stand. *In the case at bar there are strong reasons for holding the provision directory, and this aspect of the clause will be referred to further on in this opinion.* (Italics ours.)

"The further contention of appellant in this connection, to the effect that the provision is directory, and therefore cannot limit a prior mandatory provision which requires the board to examine all applicants, is, we think, unsound. These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is even greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789, Congress, finding that the various states whose territory touched navigable waters and enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several states, and such

as thereafter might be passed by them; thus relegating to the states a power which by an article of the federal constitution they had conferred upon Congress. For this reason the states are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.) 14 Fed. 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question, and it seems clear that when the duty was imposed to 'examine each new applicant, * * * recommending to the governor, where new appointments are proper, such as are meritorious', it was meant to provide against the recommendation of any person without the careful examination required. *Of course, there is a point beyond which the lawmakers cannot go in subordinating the interest of the individual to the welfare of the public, and if the petition had alleged a compliance on the part of plaintiff with the provisions as to residence and service, and had further alleged that the governor had declared that new appointments were proper, the court would doubtless have allowed the writ to prevent the discrimination against him which would have been apparent from the allegation. He would have had the same right as another to have his name considered by the governor, if he was found to possess the requisite qualifications.* That the right of an individual to examination and appointment is not absolute is evidenced by parts of this very law which are not assailed, notably the power conferred on the governor to limit the number of pilots in any

port, being controlled in his discretion by the needs of the port; also the power of the governor to remove any pilot for any reason, or for no reason, the language of the act being, 'at his will and pleasure'. (Italics ours.)

"Recurring to article 3791, it seems to us to have been intended that the governor should have both the appointing power and the discretion as to the needs of the port, the board in this latter respect being advisory. This conclusion is authorized both by the language of the act and the object sought to be accomplished. The board resides at the port, and, being charged with the duty of appointing stations and hours for the pilots, must, in the exercise of that duty, learn the necessities of the port, and it would be their plain duty, if new or other pilots were necessary, to call the governor's attention to the situation, and recommend suitable persons from whom he might select. The governor might ignore their suggestions, or conclude, in the absence of suggestions, that more were necessary, in which event he could require them to furnish him with names as provided by law. To hold that the board should examine all who apply would be to compel them to do in many cases an idle and futile thing; for if no vacancy existed, and no new appointments were necessary; there could be no purpose to be accomplished by the examination. If any considerable time elapsed from the date of the examination until the appointment was necessary, the applicant might in many ways become unsuitable,—might cease to be 'meritorious'. The clause, 'where new appointments are proper', cannot be held to be meaningless. If the state had the power to limit the number of pilots at this port, the whole act can stand. (Italics ours.)

"Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of perversion or abuse, cannot render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first place, if the clause requiring a term of service as branch pilot be directory (and it seems to be so), the governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications. Again, the board has power to suspend, and the governor to remove, in such a case, and the pilots in office could be so disciplined as to compel a cessation of the abuse complained of. If the pilots in office, for the purpose of maintaining themselves in office, should adopt a system of discharging their deputies just before the expiration of the probationary period, their purpose could be easily thwarted under the power possessed by the Board to fix or change the probationary period at will, and this could be done without notice, and the deputies in service be thus placed in a position to be examined for appointment." (Italics ours.)

Petterson v. Board of Commissioners, supra, did not reach this court. It was followed closely by *Olsen v. Smith,* (Tex. Cir. App.) 68 S. W. 320, decided in 1902. (*Olsen v. Smith* was decided in this court in 1904.) The latter case involved the identical question raised in *Petterson v. Board of Commissioners, supra.* The Texas court again upheld the Texas pilot laws—and did so squarely on the authority of *Petterson v. Board of Commissioners, supra,* which held the deputy provision to be merely directory. The court said:

> "The suit was brought by defendants in error, as duly commissioned branch pilots of the port of Galveston, against plaintiff in error, to enjoin him from piloting or attempting to pilot sail vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston, and from acting or assuming to act in any manner as branch or deputy pilot or with respect to such vessels. The decree was for injunction accordingly. The petition alleged in substance: That defendant is not a branch pilot or deputy pilot, but notwithstanding his want of power or right to act, he assumes to act and does act as such; offers his services to incoming and outgoing vessels, and is occasionally taken on board and employed by them as a pilot, contrary to law; and declares his purpose to continue holding himself out as a pilot, and petitioners believe and aver that his threats of such intended violations of law will be carried into effect, unless he is restrained. That his unlawful acts and conduct, and his avowed determination of persisting therein, have caused and are causing plaintiffs substantial and irreparable injury, and prevent plaintiffs from exercising their official rights and duties as pilots and

from earning and receiving the fees and compensation fixed by law and by the board of pilot commissioners of said port. That defendant is insolvent, and plaintiffs have no other adequate remedy than that of injunction. The substance of defendant's answer will appear from the several assignments of error as they are discussed. Demurrers were made to the petition, which were overruled, and plaintiffs' demurrers to the answer were sustained, and decree was entered granting plaintiffs the relief prayed for; the decree reciting that it appeared to the Court that they were entitled to such relief. There is no statement of facts, and we infer that the judgment was rendered on admission to the answer. * * *"

"Under the fourth and fifth assignments propositions are made: (1) 'That the legislature cannot declare a trade, profession, occupation, or business to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness from pursuing such trade, profession, occupation, or business'; and (2) 'the provisions of the statute which declare a pilot to be an officer, and limit the number of citizens who can serve as pilots to appellees, and such deputies as they may choose to appoint, are void.' The assignments are, in substance, that our statute violates section 1 of the fourteenth amendment of the federal constitution, and section 19, art. 1, of our state constitution, in prescribing the qualifications and regulating the appointment of branch pilots. Upon this subject much might be written. But in view of the universality of such laws, and their long observance and enforce-

ment in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation. Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805. The subject comes fairly within the scope of governmental or police functions. *We consider the case of Petterson v. Board, (Tex. Civ. App.) 57 S. W. 1002, as deciding the question raised by these assignments against the contention of appellant.*" (Italics ours.)

It will be seen that in *Olsen v. Smith, supra*, the Texas court simply adopted the rule announced in *Petterson v. Board of Commissioners, supra*. And as we have pointed out, the basis of the latter decision was that the commissioned pilots do not control appointments, since the deputy provision is merely directory.

In *Olsen v. Smith, supra*, the Texas court went on to say:

"A proposition under the tenth assignment is as follows: 'It is against public policy and illegal for defendants in error, either as officers of the state or individuals, to confederate and conspire against the plaintiff in error, and to use their means and influence for the purpose of preventing him from becoming a branch pilot, and from pursuing his occupation as a pilot.' This proposition is based on an allegation in defendants' answer, and stricken out, which is as follows: 'That petitioners have been and are now, confederating and conspiring to prevent defendant from pursuing his trade or vocation as a pilot at the port of Galveston, and are using their means and influence to harass and injure him,

and also to prevent any change in the statutes of the state regulating the appointment of branch or deputy pilots.' We fail to perceive how this would constitute a defense to a suit for injunction brought by plaintiffs to enjoin defendant from interfering with the exercise of their official duties, or with the emoluments of their office. It was admitted in the answer that plaintiffs were branch pilots, as alleged, and that defendants had not been created a branch or deputy pilot, and that he had been acting and offering to act as pilot to incoming and outgoing British vessels. If so, the injunction was properly granted; and the fact that plaintiffs may be using their combined efforts to prevent any change in the laws, or to prevent plaintiff from receiving appointment as branch or deputy pilot, would not have placed him in any better situation in this proceeding.

"Under the sixth, seventh, and ninth assignments, we find the following proposition: 'The combination of defendants in error, which controls and monopolizes the pilotage at this port of Galveston, and prevents competition, is illegal, in that it is in restraint of commerce among the several states and with foreign nations.' The averment in the answer to which the proposition is applicable is as follows: 'That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston, and to lessen their labors, and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement, they prevent competition and monopo-

lize the pilotage at said port of vessels engaged in the transportation of traffic and commerce along the several states and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several states and with foreign nations, and illegal; that the trade, traffic, and commerce passing through the port of Galveston are restrained, hindered, and injured by said combination, and the acts of petitioners, and the fees charged by them.' The state, as already stated, may create the office of pilot. By the same act it has created the office of commissioners of pilots, who decide upon the qualificatons of applicants for branch or deputy pilots, and who recommend to the governor, where appointments are proper, such as are meritorious, etc. They may, for sufficient cause, upon hearing, suspend a pilot or deputy; and the governor has power, at will, to remove or reinstate one. The entire subject is under the control of the governor and the commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an office is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and combine, this might be conduct that would suggest their removal by the governor, or be cause for suspension by the commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to perform its duties, or to protect themselves in its emoluments."

The decision of this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52, upholding the decision of Texas Court of Civil Appeals, amounts to nothing more than an affirmance of the doctrine first announced in *Petterson v. Board of Commissioners, supra*, to the effect that, since the deputy provision of the Texas law is merely directory, the statute is not unconstitutional. This court said:

> "The defendants in error, who were plaintiffs in the Court of original jurisdiction, as the duly licensed state pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendants in offering, when he was not authorized by law to do so, his services 'to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston.' An injunction was prayed restraining the defendant from acting 'in any manner as branch or deputy pilot, or pilot under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified.' The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. 68 S. W. Rep. 320. The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was then

transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was afirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, his writ of error was prosecuted to the latter court.

"The defense raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, 'a board of five persons of respectable standing, to be known as commissioners of pilotage'. Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority

to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803. * * *"

"It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage service, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions

> just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

Of course, piloting is subject to regulation, being vested with public interest. We contend only this: The regulation must not be arbitrary or discriminatory. We do not say that the appellants have an *absolute right* to be pilots. We do say, though, that they are entitled, equally with all others, *to be considered* for appointment. The equal protection clause of the Fourteenth Amendment entitles them to that opportunity. Under the law in force in Louisiana if the governor should desire to appoint the appellants he could not do so,—he could not even consider their application. The commissioned pilots themselves name those who may be considered, by naming the apprentices. Clearly, the statute is repugant to the equal protection clause of the Fourteenth Amendment.

If the apprentice provisions in the Louisiana statute were merely directory—as is the deputy provision in the Texas law—the appellants then would have no complaint. They might simply present their applications to the governor. They might lay before him the facts alleged

(R. p. 17) in their petition: that they are well qualified, each having had more than 15 years pilot experience; and that to bar them now from the port, when they heretofore have been cornered, so to speak, within its limits, and thereby put them entirely out of business, would be grossly unfair. They could present a very strong case to the governor.

The Louisiana Supreme Court upheld the statute as a valid exercise of the "public powers" of the state. The court said (R. p. 8):

> "It is indisputable that the right to follow any of the ordinary occupations of life is one of the privileges of citizenship, and this includes the right to pursue any lawful occupation without statutory restrictions except such restrictions as may be applied to all persons pursuing the same occupation under the same conditions. But it is also indisputable that there are certain occupations in which the public has such interest as will make those occupations subject to statutory regulations, or even prohibition. The constitutional provisions on which plaintiffs rely were not designed to interfere with the public powers of the State."

Apparently, it is the court's view that the power to regulate carries with it the power to discriminate. But of course that is not correct. The medical and legal professions are subject to regulation. Certainly a law giving a group of physicians or attorneys the power to control their professions, through an apprentice provision, would not be upheld. No different rule should prevail with

respect to piloting. Medicine and law are as thoroughly invested with public interest as piloting. The medical and legal professions are as old if not older than piloting. The commission issued to a pilot is nothing more than a certificate of competence and is not different in character from the certificates required of physicians and attorneys. In *Houston Pilots v. Goodwin*, 178 S. W. 2d 308, (1944), the Supreme Court of Texas said exactly that:

> "Doubtless everywhere pilots are licensed to practice pilotage only in particular waters, and only after they have passed an examination as to their competence therein. In Texas the license issued to pilot is issued to him as 'branch pilot' of a particular port. And such license is referred to in the statutes as though it were a commission which invests such branch pilot with an office. Art. 8270, et seq., relating to pilots of seaports; Art. 8248, et seq., relating to pilots of ports of navigation districts. The language of such statutes is misleading, for *the 'commission', which licenses a pilot to practice pilotage as the branch pilot of a particular port, is merely a certificate of competence, and does not differ in character from certificates of competence required of lawyers or doctors before they are permitted to practice law or medicine.*" (Italics ours.)

It is not surprising, considering the fact that the commissioned pilots have airtight control, that a "family organization" has developed under the administration of Act 54 of 1908 as amended. The petition shows that in 1938 and 1944, the last times that appointments were made, of the 15 appointed 12 were related to then commissioned pilots or to predecessor pilots; and that of the

41 present commissioned pilots, 34 of them are related to other pilots or predecessor pilots. It is not necessary to speculate on what could or might happen under this law—the facts are before us. Here are the appellants' allegations (R. p. 19) in that respect (which by law are admitted in considering the appellees' exception of no cause of action):

> "In substantiation of the foregoing allegations, your petitioners now list the names of those appointed by the defendant board in 1938 and in 1944, the last times that appointments were made, showing their relationship to pilots then commissioned, or to former commissioned pilots, and showing also their occupation prior to being chosen for appointment.

"1938:

Name	*Occupation*	*Relations*
H. Vogt	Ship Launch Tender	John Vogt—uncle Peter Vogt—father
Hugo Loga	Deck Hand River Tug Boat	E. P. Loga—brother J. P. Loga—father
Laurence Jurisich	Deputy Sheriff Parish Prison	Frank Jurisich—brother George Ziblich—uncle Jake Hansen—cousin Louis Ronquillo—cousin
Harry McNeely	Independent Pilot	S. S. McNeely—uncle A. T. Price—uncle J. G. Wilson—uncle
Charles Brown	3rd Mate on Foreign Vessel	Walter Thompson—uncle
Howard Cugle	3rd Mate on American Vessel	Charles Cugle—father
Jacob Hansen	3rd Mate on American Vessel	Geo. Ziblich—grandfather Jack Hansen—father
Frank Richard	River Tug Boat Mate	Frank Jurisich—cousin Louis Ronquillo—cousin Louis Ronquillo—cousin Frank Richmond, Sr.—father

1944.

Frederick A. Johnson	Shipyard worker	Charles Schalb—uncle
Paul Delesdernier	Dock Board Employee	Ira Delesdernier—brother Hugo Loga—cousin E. P. Loga—cousin Alford Loga—cousin George Loga—cousin Joseph Loga—uncle
William F. Short	Shipyard worker	A. W. Short—father W. F. Short—grandfather
Stanton Vogt	Dock Board Employee	Peter Vogt—father Henry Vogt—brother John Vogt—uncle Hugh Vogt—uncle
Jesse H. Sheffield	Steamship mate	none
Leander J. Marel	Tug Boat Captain	none
William L. Heuer, Jr.	Tug Boat Mate	none"

The Supreme Court of Louisiana said in this case:

> "The services in which pilots are engaged is one of great importance, frequently full of hardship and sometimes of peril and, regardless of time and weather conditions, they must be in their places ready to perform the duties of their vocation."

But the considerations there mentioned do not overbalance the Constitution. Too, under the federal law governing coastwise vessels, all applicants have equal opportunity for license, and there is no suggestion that coastwise navigation does not function properly. The hardships and perils and conditions mentioned above confront pilots of foreign and coastwise vessels alike. Pilots of foreign vessels face no hardships or perils or conditions that are not faced by pilots of coastwise vessels. There is no difference whatever between the duties and responsibilities of pilots of the two classes of vessels. The classes do not differ as to size, capacity, tonnage, or the like. As a matter of fact, some vessels sometimes sail in coastwise trade under enrollment and other times under registry in foreign trade. Pilots capable of handling an enrolled or coastwise vessel are equally capable of handling registered or foreign vessels. The vessels follow the same course on the Mississippi. We mention this to demonstrate that no reason—practical or otherwise—can be found for a discriminatory law governing foreign shipping.

As stated, *Olsen v. Smith, supra,* was decided in this court in 1904. There is later jurisprudence on this subject in which *Olsen v. Smith, supra,* is considered,—and the decision has not been given the interpretation placed upon it by the appellees.

State v. Board of Pilotage Commissioners, 198 Wash. 695, 90 P. 2d 238, (1939), is similar in principle to this case. The defendant, Board of Pilotage Commissioners, had closed the doors to all applicants for pilot licenses except those of its own selection. The court held that according to the terms of the statute in question the board had no right to limit the number of pilots and ordered the board, by mandamus, to examine the relator pilots. In the course of the opinion the court said, emphatically, that any statute would confer upon a pilot board the arbitrary right to license one applicant and refuse to license another, although equally qualified, would be unconstitutional. The court said:

> "It may be conceded that an administrative board, such as respondent, has considerable discretion in carrying out its duties, and that, as a general rule, such discretionary powers are not subject to review by the courts. This is not, however, a universal rule. If the action of the board is arbitrary or capricious, or was prompted by wrong motives, there is not only an abuse of discretion, but, in contemplation of law, there has been no exercise of the discretionary power, and in such cases the law will, by mandamus, compel the tribunal to act honestly and fairly. State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 P. 1064.

"We agree with respondents that the court may not substitute its judgment for that of the board, and direct that licenses be issued to appellants, or to any particular person, or that any definite number of pilots be licensed, or fix any definite time when examinations shall be held, or prescribe the general conditions under which such examinations shall be conducted. However, we believe there are certain duties required of respondents by the act, which are mandatory, and in which respondents have no discretion. We think it is mandatory that the board provide for competitive examinations; that they permit such examination to be taken by any person whose application, showing him to have the statutory qualifications, together with the statutory fee, is on file with the board at the time such examination is given; and that licenses be issued only after examinations have been taken, and then only to applicants having the qualifications prescribed by the statute.

"We are clearly of the opinion that appellants Landstrom and Jensen should have been permitted to take the examination on June 11, 1935, and that for the benefit of these two appellants at least, the board should be compelled to hold an examination.

"Appellants contend that, if a fair and reasonable construction is given to the act, it would violate no constitutional provision, but that it would violate both article 1, S. 12, of the state constitution, and the fourteenth amendment of the Constitution of the United States, U. S. C. A., if construed as contended for by respondents, to the effect that the board is therein given authority to issue a license to any applicant they may believe to be qualified,

regardless of whether or not he has taken an examination, or has the qualifications prescribed by the statute, and that it gives the board the right to limit the number of licenses issued.

"We agree with appellants that the act would be unconstitutional if given the construction contended for by respondents, in that it would leave to the board the right to determine to whom licenses should be issued upon a personal basis, at the will and pleasure of the board and not upon any basis prescribed by the legislature. It would vest in the board arbitrary power to license one applicant and refuse to license another, although qualified in every respect. Seattle v. Gibson, 96 Wash. 435, 165 P. 109; State ex rel. Makris v. Superior Court, 113 Wash. 296, 193, P. 845, 12 A. L. R. 1428; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305. *All of the foregoing cases were rested upon the principle that an ordinance which authorizes the issuing or withholding . . a license to engage in a lawful business, that is, a business which within itself is perfectly lawful, and commits to any officer or set of officers the power to decide, according to their own notions in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the fourteenth amendment of the Constitution of the United States.* In S. 12, of article 1, of our state constitution, we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any

citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." (Italics ours.)

The Supreme Court of Louisiana in this case approved the ruling in *State vs. Board of Commissioners, supra.* There the court said, as will be noted, that a law giving a pilot board authority to discriminate would be unconstitutional. Under the Louisiana statute the pilots themselves control the appointments. The case here is far worse than the case where a pilot board is given power to discriminate. It is one thing to have a board control appointments but far worse to vest that authority in the pilots themselves. For they have a selfish motive to serve—they can admit those of their own selection and exclude others. But the result is the same whether the discrimination results from board action and from the action of pilots themselves. Outsiders are prohibited from engaging in the trade or calling. There is no less a denial of equal protection of the law.

The comment of the Washington Supreme Court in *State v. Board of Pilotage Commissioners, supra,* on *Olsen v. Smith, supra,* is interesting. The court interpreted the latter decision as holding merely that a state may regulate pilotage by giving the governor the power to appoint—which in fact is the true doctrine of that case. In *State v. Board of Pilotage Commissioners, supra,* the Court said:

> "In the Olsen case, supra, the constitutionality of a pilotage act of the state of Texas was questioned, on the theory that the legislature had no right to attempt to regulate pilotage service, as it was not subject to governmental control. This act conferred upon the governor of the state of Texas the authority to appoint any number of branch pilots that might from time to time be necessary."

In *State v. Turner*, 143 Fla. 424, 196 So. 816, (1940), the pilot commisioners attempted to control the stevedore business within the port, by licensing only such firms as it chose. The court held against the board, saying:

> "Under Section 3860, C. G. S., a pilot commission has authority to limit the number of licenses granted with due regard to the business of the port. *But if this section 19, of Article 9 of Chapter 17506 is to be construed as vesting in the Port Apthority acting as a Pilot Commission authority to license or refuse to license competent and reliable contracting stevedores at their pleasure, or to place in their licenses such limitations or restrictions as they may see fit as to the particular owners or masters of vessels with whom they will be permitted to do business, or at their pleasure to permit one stevedore to operate at the Port while another equally qualified is denied, said section 19, so construed, would come in conflict with sections 1 and 12 of the Declaration of Rights and the Fourteenth Amendment to the Federal Constitution.* As was said in Maxcy v. Mayo, 103 Fla. 52, 139 So. 121, 129:

"'It has long since become an established rule of constitutional law in these United States that power and discretion, however exerted, and by whosoever exercised, must be used in such manner as not to infringe upon or impair the fundamental rights of life, liberty, property, and the pursuit of happiness. The very idea (as one opinion delivered by the Supreme Court of the United States puts it) that one man may be compelled to hold his life, business, property, means of living, or any material thing essential to his enjoyment of life, at the mere will of another, is intolerable in any country where freedom prevails, and is the very essence of slavery itself. Yick Wo v. Hopkins, 119 U. S. 356, 6 S. Ct. 1064, 30, L. Ed. 220.'

"See, also, Ellis v. Thiesen, 78 Fla. 47, 82 So. 607; State ex rel. Pittman v. Barker, 113 Fla. 865, 152 So. 682, 94 A. L. R. 1481; State ex rel. Kennel Club, Inc., v. State Racing Commission, 116 Fla. 143, 156 So. 317; State ex rel. Kennedy v. Knott, 123 Fla. 295, 166 So. 835; State ex rel. Tullidge v. Hollingsworth, 103 Fla. 801, 138 So. 372.

"The Port Authority acting as a Pilot Commission has not denied the competency and integrity of the relator Stevedoring Company but has admitted it by offer to give it a permit to handle the cargoes for two lines. Indeed, such admission was made each time they issued the licenses to the relator and accepted the $100 annual permit fee, during the years 1934 to 1938." (Italics ours.)

There is no difference in principle between the case where the rights of a contracting stevedore are involved and the case involving the rights of applicants for pilot licenses. The stevedoring business is vested with public interest very much as is piloting. It is important to the safety of the ship that it be properly loaded. In *State v. Turner, supra*, the court took occasion to remark:

> "It is further pointed out that the duties of a contracting stevedore at a great port like Port Everglades, or any other port of this State, are important, the responsibility is grave, and that the proper performance of his work may determine whether the vessel loaded by him can make a safe voyage."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, this court said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with

a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this Court in Henderson v. Mayor, etc., of New York, 92 U. S. 259 [Bk. 23, L. ed. 543]; Chy Lung v. Freeman, 92 U. S. 275 [Bk. 23, L. ed. 550]; Ex parte Va., 100 U. S. 339 [Bk. 25, L. ed. 676]; Neal v. Delaware, 103 U. S. 370 [Bk. 26, L. ed. 267], and Soon Hing v. Crowley [supra]." (Italics ours.)

The court held in *Yick Wo v. Hopkins, supra,* that a law enacted "with an evil eye and an unequal hand" violates the Fourteenth Amendment. With that principle in mind let us consider this law and particularly the 1942 amendment. The petition shows that the original law, Act 54 of 1908, was administered always for the benefit, exclusively, of the favored commissioned pilots. Knowledge of the facts in that connection is charged to the legislature. The legislature in 1942 came along and placed the port within their exclusive domain—knowing that no pilot except those having the favor of the com-

missioned pilots had a chance of being commissioned. We say that both the original act and the 1942 amendment were passed "with an evil eye and an unequal hand". Certainly the 1942 amendment was so enacted.

In *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, this court pointed out that every denial of a right conferred by state law does not necessarily involve a denial of the equal protection of the law, even though the denial of the right to one may operate to confer it on another. The court said:

> "The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

It is plain, we believe, that Act 54 of 1908, as amended, is unconstitutional on its face. But even assuming *arguendo* that the act is not unconstitutional on its face, the arbitrary, unjust and discriminatory administration of the act is still within the prohibition of the Fourteenth Amendment, under the doctrine of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, and the other cases cited above.

In *Ring v. Patterson*, 170 Or. 234, 1 P. 2d 1105, (1931) the plaintiff pilot alleged that the pilot board was controlled by a pilot organization. The court found as a fact that the board was not so controlled. The court said however that it is illegal for a board to be so controlled:

"Evidently recognizing the above principles of law, the petitioner sought to bring himself within an exception by charging that the commissioners had given themselves over to the control of the Columbia River Pilots' Association, had refused to grant him a license unless he would become a member of that organization, and unless the association favored his application. He relies upon the statement of the exception contained in 38 C. J., Mandamus, p. 598, S. 74, where the writer states that the writ may issue when the discretion of the quasi-judicial officer has been abused. In the determination of this issue of fact we feel justified in resorting to the presumption that official duty has been regularly performed (section 9-807, Oregon Code 1930), which of necessity includes a disputable presumption that the public officer has reasonably exercised his discretionary power. New York ex rel. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424. We have carefully read the testimony taken before the referee and have examined all of the exhibits introduced in evidence, but fail to find that a preponderance of the evidence indicates that the commissioners have subjected themselves to the dictates of the Columbia River Pilots' Association. The issue is one of fact only, and since no purpose would be served by an extended statement of our review of the evidence, we content ourselves with a statement of our finding that a preponderance of the evidence fails to substantiate petitioner's charge."

In *Williams v. Molther*, 198 Fed. 460, (1912), the court had this to say in respect to the federal pilotage law:

> *"While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it.* The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. *Moreover, as we stated in our previous opinion, 'such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers'."* (Italics ours.)

Note the court's reference to "dangerous monopoly". It would be difficult to imagine a tighter monopoly than that maintaned by the port pilots in Louisiana.

In *Williams v. Pope*, 215 Fed. 1000, (1914), the court had this to say in a case involving the federal pilotage law:

> "In my opinion, complainant's failure to take an appeal from the determination of the local inspectors is fatal to his cause of action, unless he can show that there was a conspiracy among the defendants and the supervising inspector to refuse him a pilot's license notwithstanding his fitness to properly fill the position of pilot. But the existence of a conspiracy to injure the complainant or to wrongfully deprive him of a license, though averred in the bill, is not shown, nor is there any evidence whatever of bad faith or ulterior motive on the part of the local inspectors in the discharge of their official duties in denying him a license. The inspectors apparently acted in perfect good faith throughout his examination, conscientiously determining his percentage."

The general rule on the subject is stated in *Corpus Juris Secundum*, Volume 16, Section 659, page 1390, thus:

> "The constitutional guaranty of due process is not violated by the fact that the granting of licenses is committed to administrative officers, who, within certain limitations prescribed by law, are authorized to exercise their discretion in the granting or refusing of licenses to particular persons or corporations, but *it is otherwise where an official or board is invested with authority to grant or withhold a license according to his or their arbitrary discretion.*" (Italics ours.)

City of Seattle v. Gibson, 96 Wash. 425, 165 P. 109, states the rule thus:

> "We have no doubt of the right of the city to require certain qualifications of applicants, not inconsistent with state law, and to provide how those qualifications may be determined, but *it may not say, by special act, that one person, or set of persons, may engage in any particular lawful calling to the exclusion of all other persons. Persons equally qualified are entitled to the same privileges under the law, and a statute or an ordinance is void which interferes with or abridges the privileges and immunities of citizens who are equally entitled to the protection of the law.* There can be no reasonable escape from the conclusion that this ordinance provides for a discretion which is purely arbitrary, and, therefore, an illegal method of determining who shall and who shall not be granted a license to conduct a drug store or pharmacy." (Italics ours.)

In *Highland Farms Dairy v. Agnew*, 16 Fed. S. 575, (1936), the court had this to say in passing on a law that provided for the appointment of a milk commission:

> "Nevertheless it is not inappropriate to point out that *the license provisions of the Act should not be interpreted to vest the Board with the absolute power to grant or refuse license, if any other reasonable construction can be adopted. Such a grant of power would be invalid*, and the attempt to exercise it arbitrary would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. Yick Wo v. Hop-

Delaware, 103 U. S. 370 (26:567); Yick Wo v. Hopkins, 118 U. S. 356 (30:220); Gibson v. Mississippi, 162 U. S. 579 (40:1078)."

The appellees cite *Bradwell v. Illinois*, 16 Wall. 130 (1873), *Ex Parte Lockwood*, 154 U. S. 116 (1894), and *Lehon v. Atlanta*, 242 U. S. 53, 37 S. Ct. 70 (1916), as authority for the proposition that the Fourteenth Amendment does not apply to pilotage.

Bradwell v. Illinois, supra, and *Ex Parte Lockwood, supra*, hold that a state may prohibit women from practicing law within its jurisdiction. State laws may provide different rules for different *classes* of persons as long as the classification is reasonable. The cases above are consistent with that rule of law. The general rule on the subject is stated in *Holter v. Nebraska*, 205 U. S. 34, 27 S. Ct. 419 (1902), thus:

> "It is well settled that, when prescribing a rule of conduct for persons or corporations, a state may, consistently with the 14th mendment, make a classification among its people based 'upon some reasonable grounds,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.' Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 160, 165, 41 L. ed. 666, 669, 670, 671, 17 Sup. Ct. Rep. 255."

Class legislation is valid only where it affects alike all persons similarly situated. In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350 (1887), this court said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which

is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' 113 U. S. 27, 32 (28:923, 925)."

Bradwell v. Illinois, *supra*, and *Ex Parte Lockwood*, *supra*, are distinguishable, plainly, from this case. The state statutes in question there applied equally to all women within their jurisdiction,—none were permitted to practice law. A law analogous to our pilot law would be one giving to a particular group of attorneys the power to control and monopolize law business within the state, through a provision requiring service as an apprentice under the group—similar to the apprentice provision in Act 54 of 1908. Certainly such a law would not be upheld.

Lehon v. Atlanta is not in point here. According to the law in question there, approval of the state police board as to fitness and character was required of persons seeking to operate private detective agencies. A pilot law merely requiring of applicant pilots like approval of a pilot board would not be objectionable. As a matter of fact most laws regulating particular occupations or professions re-

kins, 118 U. S. 356; People of State of New York ex rel. Lieberman v. Van DeCarr, 199 U. S. 552; Douglas v. Noble, 261 U. S. 165; Lehman v. State Board of Public Accountancy, 263 U. S. 394." (Italics ours.)

In *Lieberman v. Van DeCarr*, 199 U. S. 552, 26 S. Ct. 144, this court said, in passing on a sanitary code of New York City:

> "Such regulations, however, should be uniform, and the Board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer (in a lawful commodity) and refuse a license to another similarly situated, undoubtedly it would be invalid."

See also *Zucht v. King*, 260 U. S. 170, 67 L. Ed. 194.

We submit that the judgment appealed from is incorrect and should be reversed, and the Act 54 of 1908, as amended by Act 134 of 1942, decreed to be unconstitutional.

Respectfully submitted,

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This is to certify that copies of this Brief have been served opposing counsel on this .... day of ..... 1946.

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS.

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SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS.

ARGUMENT.

The appellees advance a novel argument. They argue that pilots and pilotage are beyond the scope of the Fourteenth Amendment. On page 48 of their brief, they state:

> "What is discussed in Yock Wo v. Hopkins is the protection of a right guaranteed under the Fourteenth Amendment to the Constitution of the United States to engage in a common calling. Pilotage is not a common calling."

On page 40, the appellees state:

> "It would serve no useful purpose to parade the various cases showing the power of the State to regulate various occupations free of the prohibition of the Fourteenth Amendment."

The appellees state, on page 45:

> "Many occupations are beyond the limitation of the Fourteenth Amendment."

Much is written in the law books on the subject of pilot laws. But there is no authority, anywhere, to support the argument that pilots are beyond the Fourteenth Amendment's pale.

Act 54 of 1908, as amended, will not stand the test of the Fourteenth Amendment. The appellees take the only course that is left open to them, in taking the position that they are beyond its scope. They are forced into that position, realizing as they must that an arbitrary grant of power, such as this pilot law contains, will not stand the test.

The appellees admit, quite frankly, that the apprentice provision in Act 54 of 1908 is mandatory; and that only those who are first selected as apprentices by the commissioned pilots may be considered by the governor for appointment. And the appellees judicially admit that thus the commissioned pilots are given airtight control,— to exclude all except those having their favor. The appellees say, on page 21 of their brief:

> "In granting the authority to form an association [Crescent River Port Pilots Association], which was

a special grant, apart from the general statute for the formation of corporations, the Legislature doubtless recognized that the members of this Association live in such close community that they would want to choose those with whom they must, for a large part of their lives, live with. It did not impose upon those commissioned, as a condition precedent to forming the association, the obligation to admit into the association specified individuals. It did not say to the Association that it must admit as apprentices those possessing specified qualifications. It left to the members of the Association the choice of those whom they were willing to train for the possibility of being commissioned. Presumably, the Legislature thought that the members of the Association were best fitted to select those whom they desired as apprentices who might thereafter live almost a family life."

The issue here is plainly drawn. It is simply this:—Does the Fourteenth Amendment extend to pilots? Admit that it does and this pilot law must fall. And there can be no doubt that pilots do come within the protection of the Fourteenth Amendment.

The Fourteenth Amendment declares that no state shall "deny to *any person* within its jurisdiction the equal protection of the law". (Italics ours.) No one is excluded. The guaranty applies equally to persons following pilotage as to persons in any other calling. A state may, under the police power, regulate any occupation or profession that is vested with public interest. The appellees argue that the authority to *regulate*, under the police power, carries with it the power to *discriminate*;—which is not so.

It is well settled that police regulations by a state must conform with the equal protection guaranty of the Fourteenth Amendment. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, (1902), this court said:

> "The question of constitutional law, to which we have referred (the equal protection of the laws), cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law'. The state has undoubtedly the power by appropriate legislation, to protect the public morals, the public health, the public safety; but if, by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1,210, 6 L. ed. 23, 73; Sinnot v. Devenport, 22 How. 227, 243, 16 L. ed. 243, 247; Missouri, K & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 19 Sup. Ct. Rep. 488."

As a matter of fact, *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52, relied upon by the appellees, holds that pilots are entitled to the protection of the Fourteenth Amendment. The court said:

> "The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the state of Texas had power to enact laws regulating pilotage in the ports of that state; and, second, if such power existed, whether the provisions of the state statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the 14th Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce."

See also *Chicago, B. & Q. R. Co. vs. Chicago*, 166 U. S. 226, 41 L. Ed. 979, where the court said:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'. Ex parte Virginia, 100 U. S. 339, 346, 347 (25:676, 679); Neal v.

quire like approval from some board or other state agency. Explaining its ruling, the court said in *Lehon v. Atlanta, supra:*

> "The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the state has been too recently explained to need further enunciation. The present case is easily within its principal. It would be very commonplace to say that the exercise of police is one of the necessary activities of government, and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the state, have the stamp of the state as to fitness and character, take an oath to the state for faithful execution of its duties, and give a bond for their sanction. This the state may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other state."

We earnestly submit that the equal protection guaranty of the Fourteenth Amendment extends to the plaintiff pilots and that Act 54 of 1908, as amended, violates the guaranty.

The appellees relate their conception of pilot operations on the Mississippi River. A large part of their brief is given over to the discussion. There is nothing in the record to support the discussion and hence it has no place

in the brief. The appellees elected (R. p. 22) to try the case out on an exception of no cause of action. They might have tendered the issue now made in an answer regularly filed. Then the plaintiffs, appellants here, would have had an opportunity to meet the issue and present their side. The discussion *dehors* the record of course will be disregarded by Your Honors.

The purpose of this argument *dehors* the record is plain. The appellees would have Your Honors believe that this discriminatory pilot law is necessary because of practical considerations. The appellees state, on page 21 (see above), that the commissioned pilots together "live an almost family life". Therefore, they argue, the pilots should be given the right to select their associates. Their argument is that monopoly makes for better efficiency in pilotage.

There is no force in the argument. In the first place, the Constitution of the United States must be obeyed. And in the second place, there is no reason—practical or otherwise—for a discriminatory law in respect to pilotage. The federal statute governing pilotage of coastwise vessels, Sec. 4444, Revised Statute of the United States (46 U. S. C. A. Sec. 215) is not discriminatory. Anyone possessing the required qualifications as to skill, character, et cetera, is entitled to a federal license. (The plaintiff pilots hold first class federal pilot licenses.) The federal law was derived from Act of February 28, 1871, Sec. 51, 16 Stat. 455. Congress might have repealed the law at any time, the effect of which would have been to give over to the state coastwise pilotage for state regulation and control.

The fact that Congress has retained control of coastwise pilotage is proof at least that Congress considers that coastwise shipping is functioning satisfactorily.

Pilots on coastwise vessels have the same duties and responsibilities as those on foreign trade vessels. There is no difference between the two classes of vessels as to size, tonnage and the like. As a matter of fact, some vessels sometimes sail in coastwise trade under enrollment and other times under registry in foreign trade. The vessels ply the same course on the Mississippi. The appellees refer to the hardships and conditions which commissioned pilots on foreign trade vessels must face. They face no hardship or condition that pilots on coastwise vessels do not face.

It is unsound in the extreme to argue that a pilot monopoly is needed for foreign shipping but not for coastwise shipping. We remind Your Honors that the appellees here advancing the argument are beneficiaries of the monopoly.

The appellees state, on page 16:

> "In 1908, the Legislature enacted the statute under attack, whereby it created the Board of River Port Pilot Commissioners to recommend to the Governor applicants for commissions as pilots. This act was in substance like Act 63 of 1877 under which the Associated Branch Pilots was created."

The appellees are in error—there is no similarity between Act 63 of 1877 and Act 54 of 1908 in respect to admittance of pilots. Act 63 of 1877 declares that anyone

of good character passing the pilot examination is eligible, stating:

> "The Board of Examiners of Pilots shall meet on the first of May and the first of October of every year in the City of New Orleans, or such other place as may be designated after thirty days notice in the official journal of this State, where they shall hold an examination, which shall be open to all who may wish to attend, to decide upon the qualifications of applicants for the office of branch pilots of the port of New Orleans, and the said Board of Examiners, shall issue certificates to all candidates who may pass a satisfactory examination, and who shall present certificates of good character satisfactory to said board."

The appellees state on page 34:

> "The case is ruled by Olsen v. Smith, 195 U. S. 332, and Ring v. Oregon, 276 U. S. 607. Olsen v. Smith, affirmed the constitutionality of a Texas statute which, in substance, is the same as the legislation under attack here. Ring v. Oregon came here on error to the Supreme Court of the State of Oregon, upholding the constitutionality of a similar statute. It was argued here on December 13th and 14th, 1927, and was decided on March 19, 1928, by a per curiam opinion reading:
>
> "'Affirmed on the authority of Olsen v. Smith, 195 U. S. 332, 342, 343, 345.'"

We pointed out in our original brief that *Olsen v. Smith, supra*, does not support the appellees. *Ring v. Olsen, supra*, certainly does not support them. Ring was prosecuted criminally for piloting a foreign trade vessel without a

license from the State of Oregon, in violation of one of its laws. The case has no bearing on the question of discrimination in the issuance of state licenses. The state decision is reported: 122 Or. 644, 259 P. 780.

Respectfully submitted,

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This is to certify that copies of this Brief have been served opposing counsel on this ... day of February, 1947.

.....

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

BRIEF IN SUPPORT OF THE APPELLANTS' PETITION FOR A REHEARING.

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ARGUMENT.

Your Honors concede that Act 54 of 1908 gives the pilot board and the commissioned pilots themselves absolute control of appointment, through the provision requiring service as an apprentice under a commissioned pilot.

The majority opinion holds that the act is constitutional, nevertheless.

It is held by the majority members of the court that a discriminatory law in respect to pilotage on the Mississippi River is desirable for the good of commerce and shipping. We fail to see how the court could reach any conclusion on that score;—for there is no evidence in the record one way or the other. The case was tried out on an exception of no cause of action filed by the defendants. The defendants might have tendered such issue, in an answer regularly filed. The plaintiffs then would have had an opportunity to present their side. But the defendants elected to try the case out on an exception of no cause of action. The case has been decided against the plaintiffs on a factual issue which they had no opportunity to meet. The record contains no facts other than those alleged in the plaintiffs' petition. By the rules of practice of Louisiana, all well-pleaded allegations of fact are admitted in considering an exception of no cause of action. *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 2d 233.

Since the adoption of the Fourteenth Amendment it has been the law of the land that persons similarly situated are entitled to equal opportunity in the pursuit of a lawful calling or profession. The majority opinion in this case narrows the equal protection guaranty. The opinion holds that to render a state law unconstitutional it is not enough that the act discriminate among persons similarly situated, —that the discrimination, to render the act invalid, must be based upon hostility to a "particular race, religion, beliefs, or * * * other reason having no relation to the regulated activities."

The majority ruling is contrary to the settled jurisprudence of the land. The court here has departed from the principle that persons similarly situated are entitled to equal opportunity. Opportunity, equal opportunity, is the very essence of the Fourteenth Amendment. The majority opinion holds that a state may discriminate where it deems it expedient to do so.

The general rule on the subject is stated in *Corpus Juris Secundum*, Volume 6, Section 496, thus:

> "Classification of businesses, occupations, and callings may be made according to natural, reasonable and well-recognized lines of distinction, and the mere fact that a statute or ordinance applies only to a particular position or profession, or to a particular trade, occupation, or business, or discriminates between persons in different classes of occupations or lines of business, does not render it unconstitutional as class legislation, and such statutes are valid whenever the partial application or discrimination is based on real and reasonable distinctions existing in the subject matter, and affects alike all persons of the same class or pursuing the same business under the same conditions, but *statutes are void* as class legislation wherever they are restricted in their application to certain professions, trades, occupations, or businesses without any reasonable basis for such partial application or discrimination, or *whenever persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions.*" (Italics ours.)

In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, this court said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, *if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.*' 113 U. S. 27, 32 (28:923, 925)." (Italics ours.)

In *Dent v. State of West Virginia*, 127 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231, this court said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors,

and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorize it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

In *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, 9 S. Ct. 207, this court said:

"We will consider the objections of the railway company in the reverse order in which they are

stated by counsel. And first, as to the alleged conflict of the Law of Iowa with the clause of the Fourteenth Amendment ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. *That clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition.* Equality of protection implies not merely accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

The general rule on the subject is stated in *American Jurisprudence*, Volume 11, Section 336, thus:

"The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guaranties of the Fourteenth Amendment. It has been said that the preservation of such right is the principal purpose of the Constitution itself and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. The right is fundamental, natural, inherent and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business, occupation, or calling is 'property' within the meaning of the constitutional provisions as to due process of law and is also included in the right to liberty and the pursuit of happiness.

"The right of a person to pursue a calling, consistent with proper and reasonable police regulation which the particular situation may sanction, cannot be taken away by legislative enactment. The com-

mon businesses and callings of life, the ordinary trades and pursuits, which are innocent in themselves and which have been followed in all communities from time immemorial, upon the same terms. *Any person is at liberty to pursue any lawful calling, under such restrictions as are imposed upon all persons of the same age, sex, and condition.* It is not competent, generally speaking, to forbid any person or class of persons whether citizens or resident aliens, to offer their services in lawful business or to subject others to penalties for employing them. Moreover, it has been held that the right to choose one's occupation includes the right to be free from unlawful interference or control in the conduct of it.

"The granting of monopolies or exclusive privileges to corporations or persons is an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, but the Fourteenth Amendment does not protect a business against the hazards of competition." (Italics ours.)

The majority opinion in this case states:

"It is within the framework of this long-standing pilotage regulation system that the practice has apparently existed of permitting pilots, if they choose, to select their relatives and friends as the only ones ultimately eligible for appointment as pilots by the governor. Many other states have established pilotage systems which make the selection of pilots on this basis possible."

But the laws of most states allow equal opportunity to pilots for license.

The pilot law of the State of Washington is explained in *State vs. Board of Pilotage Commissioners*, 198 Wash.

695, 90 P. 2d 238. It is contended by the pilot board in that case that the Washington law gives the board absolute control of appointments. The court held otherwise—and the court declared that had the law attempted to do so it would be unconstitutional, stating:

> "Appellants contend that, if a fair and reasonable construction is given to the act, it would violate no constitutional provision, but that it would violate both article 1, S. 12, of the state constitution, and the fourteenth amendment of the Constitution of the United States, U. S. C. A., if construed as contended for by respondents, to the effect that the board is therein given authority to issue a license to any applicant they may believe to be qualified, regardless of whether or not he has taken an examination, or has the qualifications prescribed by the statute, and that it gives the board the right to limit the number of licenses issued.
>
> "*We agree with appellants that the act would be unconstitutional if given the construction contended for by respondents, in that it would leave to the board the right to determine to whom licenses should be issued upon a personal basis, at the will and pleasure of the board and not upon any basis prescribed by the legislature. It would vest in the board arbitrary power to license one applicant and refuse to license another, although qualified in every respect.* Seattle v. Gibson, 96 Wash. 425, 165 P. 109; State ex rel. Markris v. Superior Court, 113 Wash. 296, 193 P. 845, 12 A. L. R. 1428; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305. *All of the foregoing cases were rested upon the principle that an ordinance which authorizes*

the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is perfectly lawful, and commits to any officer or set of officers the power to decide, according to their own notions, in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the fourteenth amendment of the Constitution of the United States. In S. 12, of article 1, of our state constitution, we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." (Italics ours.)

Petterson v. Board of Commissioners (Tex. Civ. App.) 57 S. W. 1002 and *Olsen vs. Smith* (Tex. Civ. App.) 68 S. W. 320, cited in our original brief, explain the Texas pilot law. The court decided that under the Texas law commissioned pilots do not control appointments, for the provision requiring service as a deputy is merely directory and may be ignored by the governor. In *Petterson v. Board of Commissioners, supra*, the court in no uncertain terms condemned the system of permitting pilots to perpetuate themselves in office and select their successors. In alluding to such system the court used the terms "perversion and abuse". The court said:

"Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a

graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of *perversion or abuse*, cannot render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first place, if the clause requiring a term of service as branch pilot be directory (and it seems to be so), the governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications." (Italics ours.)

The Oregon pilot law, Section 105-219, Oregon Compiled Laws, Volume 7, contains provisions for equal opportunity for license, declaring:

"Qualifications of Pilot: No person shall be licensed as a pilot unless he is an American citizen of the age of 21 years at least, of temperate habits and good moral character; nor unless he possesses the requisite skill and the experience as a navigator and pilot, together with practical knowledge of the currents, tides, soundings and bearings and distances of the several shoals, rocks, bars, points of lands, lights and fog signals of or pertaining to the navigation of the pilot ground for which he applies for a license to act as a pilot, and an applicant for a license over river pilot ground must have at least 1 year continuous experience piloting vessels in the domestic trade prior to making application for a license, and must have

had the necessary experience in handling vessels through the bridges, with and without towboats, under varying conditions."

The New York pilot law, Section 17, Cahill's Consolidated Laws of New York, likewise contains equal provision for license, declaring:

"Every person employed as master, pilot or engineer on board of a steam vessel or a vessel propelled by machinery, carrying passengers or freight for hire, or towing for hire, shall be examined by the inspectors as to his qualifications, and if satisfied therewith they shall grant him a license for the term of 1 year for said boat, boats or class of boats as said inspectors may specify in such license."

The Georgia pilot law, Sections 80-104, 80-105 and 80-106, Georgia Code of 1938, likewise contains equal provision for license, declaring:

"80-104. The commission of pilotage at each of the ports of the State are empowered to license such persons (being citizens of the United States) of good character as they shall think most fit to act as pilots, for the purpose of conducting vessels inward to and outward from the several ports and rivers for which they shall be licensed during their good behavior. The number of licensed pilots shall not exceed 20 for the port of Savannah, 10 for the port of Doboy and Darien, 12 for the port of Brunswick, 2 for the Great Satilla River, and 8 for the port of St. Mary's; and when vacancies shall occur in the number of pilots in any one of the above-named ports or rivers, the commissioners of that port may in their discretion grant licenses to pilots as hereinbefore provided until their number of pilots reaches the number allowed by this

section for that port or river. (Acts 1886, p. 38; 1896, p. 85; 1901, p. 30; 1921, p. 103.)

"80-105. Term of Service of Apprenticeship as Prerequisite to Grant of License. No person shall receive a certificate to act as pilot until he shall have served as apprentice two full years in a decked pilot-boat on the bar for which he seeks to be a pilot (the crew not to be considered as apprentices unless so registered in the office of the commissioners of pilotage), and shall have given satisfactory evidence of character and skill, and any certified pilot shall serve 18 months before he shall be entitled to an increased authority; but, in case of emergency such additional pilot may be appointed as the mayor or other chief officer of the port may determine—the foregoing restrictions of the contrary notwithstanding. (Act 1830, Cobb, 43, Acts 1882-3, p. 70.)

"80-106. Branch Pilots, Appointment of. All branch pilots shall be appointed by the commissioners; and whenever a vacancy shall occur in a branch, the person who shall have served the longest time as an apprentice shall, if deemed competent by the commissioners, be appointed to the vacancy; but no person may hold a branch who is not engaged in the pilotage."

The California pilot law, Sections 1100 and 1101, Deering's California Code, likewise contains equal provision for license, declaring:

"1100. Qualifications of Pilots—A person may not be appointed or licensed as a pilot unless he is an American citizen, over the age of 21 years, and unless he has a practical knowledge of the management of sailing vessels and stream vessels and of the tides,

soundings, bearings, and distances of the several shoals, bars, rocks, points of landings, lighthouses, and fog signals of the ports and harbors for which he is appointed. He shall be of good moral character, and temperate, and he shall possess the skill and ability necessary to discharge the duties of pilot. (Enacted 1937.)

"1101. Licenses; Renewal; Withholding Renewal: Pilots licensed by commissioners shall be carefully examined as to their qualifications, and, if found to be qualified and worthy, they shall receive licenses as pilots for a term of 12 months. Licenses shall be renewed annually unless the commissioners have good cause, or intend for any reason to withhold renewal of a pilot's license, the secretary of the board of commissioners shall serve notice, in writing, on the pilot, specifying the causes, at least 10 days before the expiration of his license. The pilot is thereupon entitled to a full hearing before the board." (Enacted 1937.)

The Connecticut pilot law, Section 3081, Revised General Statutes of Connecticut, likewise contains equal provision for license, declaring:

"The superior court, or any judge thereof in vacation, may, in any county adjoining navigable waters, license as many persons as said court or judge may deem necessary and find qualified, to act as pilots for 3 years in any of the waters of this state. No person shall be so licensed until he shall have given notice of his intention to apply for a license, and of the court and judge to whom, the time when, and the place where such application will be made, by advertising the same at least 6 times in some daily newspaper published in the town where such person

> resides, or if there be none, at least 4 times in some weekly newspaper published in such town or in the nearest adjoining town. Every pilot shall upon the granting of his license, give a bond of $500.00 to the treasurer of such county and his successors in office, with surety, to the acceptance of the court or judge granting such license, conditioned for the faithful performance of his duties as a pilot, upon which bond suit may be brought in the name of any of such treasurer for the benefit of any person who may suffer loss * * *"

It is seen that the majority of states—including New York, California, Oregon, Washington, and Texas, which perhaps have the major part of the country's shipping,—deem discriminating in pilotage unwise. And such system is condemned in the jurisprudence. Note what is said in *Petterson v. Board of Commissioners, supra,* and *State v. Board of Pilotage Commissioners, supra.*

In *Ring v. Patterson,* 170 Or. 234, 1 P. ed. 1105, the plaintiff pilot alleged that the pilot board was controlled by a pilot organization. The court found as a fact that the board was not so controlled. However, the court condemned the practice of a pilot board being controlled by a pilot organization. The court said:

> "Evidently recognizing the above principles of law, the petitioner sought to bring himself within an exception by charging that the commissioners had given themselves over to the control of the Columbia River Pilots' Association, had refused to grant him a license unless he would become a member of that organization, and unless the association favored his application. He relies upon the statement

of the exception contained in 38 C. J., Mandamus, p. 598, S. 74, where the writer states that the writ may issue when the discretion of the quasi-judicial officer has been abused. In the determination of this issue of fact we feel justified in resorting to the presumption that official duty has been regularly performed (section 9-807, Oregon Code 1930), which of necessity includes a disputable presumption that the public officer has reasonably exercised his discretionary power. New York ex rel. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424. We have carefully read the testimony taken before the referee and have examined all of the exhibits introduced in evidence, but fail to find that a preponderance of the evidence indicates that the commissioners have subjected themselves to the dictates of the Columbia River Pilots' Association. The issue is one of fact only, and since no purpose would be served by an extended statement of our review of the evidence, we content ourselves with a statement of our finding that a preponderance of the evidence fails to substantiate petitioner's charge."

In *Williams v. Molther*, 198 Fed. 460, the court ruled illegal a regulation adopted by federal inspectors requiring certain deck experience of applicants for pilot license. In the course of its opinion the court states that the regulations might in practice create "a dangerous monopoly of the business of pilots and marine engineers." The court said:

"While no citizen has the inherent right to a pilot's license, every citizen has a right to be exam-

ined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. *Moreover, as we stated in our previous opinion, 'such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers.'*" (Italics ours.)

The majority opinion concludes that the exigencies of pilotage demand a discriminatory law,—and that the demand is so great that the principle guaranteeing equal opportunity to persons equally situated must give way. The opinion so concludes though no evidence on the subject has been heard. We earnestly submit that a rehearing should be granted. The plaintiffs have not had their day in court. Given an opportunity to be heard the plaintiffs will show that this pilot law that closes the

door to all except family members and friends of a small clique is unwise. The fact that pilotage is so thoroughly invested with public interest—so important to public safety—is all the more reason why the test for licenses should be skill, not blood relationship. The practice of discrimination in licensing of pilots is condemned in the jurisprudence, and is forbidden by the laws of most states, as well as by the federal pilot law. That fact should carry much weight. Surely it should impel the court to hear the case fully.

The majority opinion calls attention to discriminatory pilot laws of certain states. Pilots have succeeded in passing such laws in some states. Monopolies generate power—power before state assemblies. To date the courts have frowned on such pilot monopolies. By the decision in this case pilot combines are given a green light.

We respectfully submit that a rehearing should be granted in this cause, and that on rehearing, the judgment rendered by this court on March 31, 1947, and the judgment of the district court be reversed.

Respectfully submitted,

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CHARLES A. O'NIELL, JR.,
Counsel for Appellants.

EDWIN H. GRACE,
JAMES O'NIELL,
Of Counsel.

This is to certify that copies of this Brief have been served on opposing counsel on this the .... day of April, 1947.

.....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 291

MARION B. KOTCH, JOHN L. RICHARDS, ADOLPH CLARK, ET AL.,

Appellants,

v.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ARTHUR A. MORENO,
Counsel for Appellees.

SUPREME COURT OF LOUISIANA

No. 37,809

MARION B. KOTCH, ET AL.,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee believing that the matters hereinafter set forth demonstrate the lack of substance in the questions raised by this appeal, files this statement in opposition to appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Louisiana on the ground that the questions raised on behalf of appellant are so insubstantial as not to need further argument.

The constitutionality of Act 54 of 1908, as amended by Act 134 of 1942, is attacked on the ground that it is violative of the Fourteenth Amendment of the Constitution of the United States. The Act is one enacted under the police power of Louisiana for the regulation of pilotage in the Port of New Orleans. The authority of the State to regulate pilotage was recognized in *Cooley* v. *The Board of Wardens of Philadelphia*, 12 How. 299. The authority of the State to prescribe qualifications and to limit the num-

ber of pilots has never been doubted. Compulsory pilotage has been a part of State regulation throughout this country. The constitutional power to nominate pilots and to prescribe their qualifications, and to compel the acceptance of their services, was recognized in *Ex Parte McNiel*, 13 Wall. 236.

In Louisiana, a pilot is a state officer, commissioned by the Governor. *State ex Rel. Egan, Attorney General* v. *Follette*, 33rd Ann. 228. No one has a constitutional right to be commissioned. It is within the authority of the Governor to grant or to withhold commissions without regulation or restriction. The very issue presented by this appeal was decided adversely to the appellant in *Olsen* v. *Smith*, 195 U. S. 332.

In that case, a statute of Texas conferred upon a board of five persons, appointed by the Governor, the power to fix charges to:

> "regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and if occasion requires, suspend them until the Governor shall act in the matter".

The difference between the Texas statute and the Louisiana statute is that the Board of River Port Pilot Commissioners in Louisiana is composed of three members, whereas in Texas, the Board was composed of five members The nature of their respective powers and duties is substantially the same. In that case, it was contended:

> "That because the commissioned pilots have a monopoly of the business and by combination among themselves exclude all others from rendering pilotage services".

The contention was there made, as is made here, that appellant could not become a commissioned pilot because of the alleged monopoly and combination.

The court said:

> "When the propositions just referred to are considered in their ultimate aspect, they amount simply to the contention, not that the Texas laws are void, for want of power, but that they are unwise".

The most searching analysis, using every instrument of logic and differentiation, can find no difference between the Texas statute and the Louisiana statute in matters of substance.

Because the question has been clearly and unqualifiedly decided against the appellant here, the appeal offers no substantial question for decision by this court.

WHEREFORE, appellee respectfully submits this statement to show that the questions upon which the decision of this case depends are so insubstantial as not to need further argument, and appellee respectfully moves the court to dismiss this appeal, or, in the alternative, to affirm the decree entered below.

(Signed) ARTHUR A. MORENO,
Attorney for Board of River Port Pilot Commissioners for the Port of New Orleans, T. J. McCarthy, Harry J. Post and C. J. Zatarain, Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 291

MARION KOTCH, ET AL.,

Appellants,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

REPLY BRIEF FOR APPELLEES IN SUPPORT OF MOTION TO DISMISS.

ARTHUR A. MORENO,

[illegible]

WM. B. LEMLE,

LOUIS G. LEMLE,

Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

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REPLY BRIEF FOR APPELLEES IN SUPPORT OF MOTION TO DISMISS.

May It Please the Court:

In the brief of appellants, it is insistently said that the case of *Olsen v. Smith*, *195 U. S. 332*, "fairly considered, supports appellants." We, with equal insistence and more vehemence, insist that however considered, the cited case does not support the contention of appellants.

It is also said that in order to understand the decision in *Olsen v. Smith*, *supra*, the jurisprudence leading up to its decision must be reviewed. The review of the Texas jurisprudence is not a review of the jurisprudence

of the United States Supreme Court leading up to the decision of *Olsen v. Smith, supra.* The decision of the Supreme Court of the United States does not require any light from a review of the jurisprudence of the Texas Court. The statement of the case, the grounds of decision, and the decision of *Olsen v. Smith* itself are clearly stated, and destroy the possibility of any ambiguity requiring explanation by the history of Texas jurisprudence.

This court said clearly that it would accept interpretation of statutes as made by the Supreme Court of the state whose legislative enactment was under attack. The Supreme Court of Louisiana has answered all of the questions which were propounded in the lower court and are presently urged here. The only question before this court is the constitutionality of the statute when tested by the 14th Amendment of the Constitution of the United States.

All of the reasoning of the Texas Court set out at length in *Petterson v. Board of Commissioners,* 50 S. W. 1002, can have absolutely no bearing on the decision of the matter here. What was said by the Texas Court sheds no light on the problem here. Your Honors are dealing solely with a decision of the Supreme Court of Louisiana and the validity of that decision must rest upon the principles of federal law and not upon the principles of Texas law. It would serve no useful purpose to analyze what was said by the Texas court, because Your Honors have already enunciated decisions which are decisive here and which are not overruled or nullified by reasoning of the Texas Court. What is said in the brief of the appellants from page six including page nineteen, fattens the brief, but

does not enlighten the court on an issue based upon the 14th Amendment of the Constitution of the United States to be decided by the Supreme Court of the United States.

Your Honors, after disposing of all of the issues arising out of the special terms of the Texas statute, reached the final issue in that case and the issue here and, in *Olsen v. Smith*, said the following:

> "It remains only to consider the contention based upon the 14th Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services and to render them is an inherent right guaranteed by the 14th Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State

> are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect, they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply in the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise the authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

We are at a loss from a reading of the decision in *Olsen v. Smith* to understand upon what ground appellants say that because the Texas Court held that a period of apprenticeship was merely directory and not mandatory, that, therefore, Your Honors upheld the constitutionality of the statute on that ground. There is not a single word, nor the suggestion of a syllable, that Your Honors upheld the constitutionality of the statute because of something said by the Texas Court.

Your Honors upheld the constitutionality of the Texas statute upon the ground that until Congress had legislated, the State of Texas had plenary power to regulate pilotage. Your Honors clearly held that the states had full power to regulate pilotage and that a person competent to perform pilotage service does not have the inherent right to be appointed a pilot. It held that the states, in providing who should be pilots, had complete

power over the appointment of pilots and that in the exercise of such complete power, there was no violation of the 14th Amendment, because only those having a constitutional right to be appointed pilots could claim the benefit of the 14th Amendment; and, since the appellants in that case had no inherent right to such appointment, they did not come within the benefits of the 14th Amendment.

The proposition here asserted is that only those applicants who have served an apprenticeship are eligible, and since the only way to serve an apprenticeship is by the grace of the commissioned pilots, that there is thereby created, a monopoly by those who are already commissioned pilots. Your Honors have squarely and unequivocally answered that contention in the cited case by saying that the argument attacks the wisdom of the law, but does not invoke constitutional correction. Your Honors have said that the corrective of the unwisdom of the law does not lie within the province of the court, but within the power of Congress to change the law.

We, therefore, respectfully say that all of the discussion of the decisions by the Texas Court is, "so much whistling in the wind." The decisive reasoning is found in the jurisprudence of the Supreme Court of the United States. The summation of that reasoning is found in the quoted part of *Olsen v. Smith, supra*. We respectfully say that no power of reasoning can differentiate this case from the cited case when tested by the constitutional question here involved. Whatever might have been the *ratione decidendi* of the Texas Court is not controlling here. The

reasoning of this court and the decision in *Olsen v. Smith*, *supra*, should be decisive of the issue tendered. *Olsen v. Smith* answers every question raised by the appellant here and specifically destroys such contentions completely. Therefore, the appeal should either be dismissed, or the judgment of the lower court affirmed.

Respectfully submitted,

ARTHUR A. MORENO,
Counsel for Appellees.

SELIM B. LEMLE,
LOUIS G. LEMLE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 291

MARION KOTCH, ET AL.,
Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,
Appellees.

ORIGINAL BRIEF OF APPELLEES.

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SYLLABUS.

(1) The states have been granted, by Act 7 of 1789, (Sec. 4) the right to regulate pilotage in conformity with the laws existing prior to August 7, 1789. Congress has never taken away the authority of the states over such regulation insofar as pilotage relates to foreign vessels. *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Ex Parte McNeil*, 13 Wall. 236.

(2) Congress, from the beginning, has recognized, because of the differences in conditions throughout the

country, the need of differences in pilotage regulations, and because of such differences that the regulation of pilotage requires no exclusive regulation by Congress.

(3) State pilots in Louisiana are not licensed as in many other states, but are officers appointed by the Governor. *Williams, et al., v. Payson, et al.*, 14 La. Ann. 7; *State ex rel Follette v. Egan*, 33 La. Ann. 230; *Levine v. Michel*, 35 La. Ann. 1121.

(4) The Governor has plenary power to commission pilots, subject only to the limitation that they be certified by the Board of River Port Pilot Commissioners as to competency, but mere competency does not entitle everyone to be commissioned by the Governor. *Act 54 of 1908 (§4).*

(5) Commissions issue only when there is a need for more pilots. The Governor is not compelled to commission any number of pilots, nor to select any individual or individuals for commissions, but may commission pilots in his discretion when vacancies exist. *Act 54 of 1908 (§4).*

(6) The Legislature of Louisiana has the authority to enact statutes regulating pilotage and to provide that only those commissioned by the Governor as state officers, shall become pilots, and the provision that an applicant for a commission shall serve an apprenticeship does not render the statute invalid. *Olsen v. Smith*, 195 U.S. 332.

(7) It is no part of the judicial function to substitute the judicial judgment for the legislative power, and to say the provision that one shall serve an apprenticeship is unwise because of the difficulty of certain individuals to serve such apprenticeship. The judicial function is exhausted with the discovery that the relationship between means and ends is not wholly vain and fanciful, but is expressive of the legislative judgment that the means chosen best serve the public interest. *O'Gorman & Young v. Hartford Fire Insurance Company*, 282 U. S. 251, 257; *Williams v. Mayor*, 289 U. S. 36.

(8) He who would successfully assail a law as unconstitutional must show that the feature of the act complained of operates to deprive him of some constitutional right, but mere inability to achieve public office does not come within the constitutional protection. *Plymouth Coal Company v. Penn.* 232 U. S. 540, 544; *Lehon v. City of Atlanta*, 242 U. S. 53; *Akins v. Kingsbury*, 247 U. S. 484, 489.

(9) The complaint that only those who have served an apprenticeship can be commissioned by the Governor as a pilot, does not come within any provisions of the Fourteenth Amendment, because no one has a constitutional right to be so commissioned, and since he has no constitutional right to be so commissioned, Louisiana may adopt any statutory regulation which to it seems desirable and may grant to the Governor an unlimited discretion in his choice of those to be commissioned. *Olsen v. Smith*, 195 U. S. 332, *Ring v. Oregon*, 276 U. S. 607.

(10) No substantial Federal question is presented because the constitutionality of a similar statute, enacted by the State of Texas, was held to be constitutional, and was used as the basis of the decision in another case involving the same point. *Olsen v. Smith*, supra, *Ring v. Oregon*, supra.

(11) No discrimination created by the statute is alleged by appellants, who merely allege that they, as members of the general public, for special reasons, cannot comply with the requirements of the statute, but that others, as members of the general public, may comply with the requirements of the statute, and thereby become commissioned as pilots. The statute shows no arbitrary or unreasonable discrimination operating as in *Yick Wo v. Hokpins*, 118 U. S. 256, to invade a constitutional right. The difference finds expression in *Gundling v. City of Chicago*, 177 U. S. 183.

THE ISSUE.

Appellants filed suit in a State Court of Louisiana, asking that Act 54 of 1908, as amended by Act 134 of 1942, be declared unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. In the alternative, they prayed that the amendment by Act 134 of 1942 be declared unconstitutional as violative of the Fourteenth Amendment. They made an alternative prayer for a mandamus. This plea disclosed their remedy, if any were needed.

THE JUDGMENT.

The appellees filed an exception of no cause of action, which is like the common law demurrer, which was upheld by the trial court. On appeal, the Supreme Court of Louisiana affirmed the judgment of the lower court. It did not pass upon the State question of the right of a mandamus, so that there is before this Court only the question of whether or not the statute, as amended, is violative of the rights guaranteed to the appellants by the Fourteenth Amendment.

THE ALLEGATIONS.

The appellants alleged that they are licensed river pilots, holding first class licenses from the United States; that they are well qualified, having been actively engaged as pilots on the Mississippi River and other waters, and have been so actively engaged for more than fifteen years; that Act 54 of 1908 conferred upon the Board of River Port Pilot Commissioners and on the commissioned pilots themselves, absolute power in respect to appointments; that by the statute, only those having the favor of the pilots can be appointed; that in the past the appellants have centered their activity largely to the port itself, but by Act 54 of 1908, are barred from piloting vessels between the Port of New Orleans and the passes at the mouth of the River; that coastwise shipping, which they are entitled to pilot, is far too small for them to earn a livelihood from such pilotage alone and that the amendment by Act 134 of 1942 closed the port to them and will force them to give up their occupation as pilots and seek other pursuits.

ACT 54 OF 1908, AS AMENDED.

Act 54 of 1908, in substance, provides that the Governor shall appoint, by and with the advice and consent of the Senate, three citizens, who shall form the Board of River Port Pilot Commissioners, who are removable by the Governor for cause, and who shall qualify by taking an oath of office.

The statute further provides:

> "That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return."

and that

> "There shall be twenty-eight (28) such pilots appointed and commissioned by the Governor immediately upon the promulgation of this act".

The act further provides that these 28 pilots shall be chosen from those pilots who have been actively and continuously engaged for one year previous in piloting sea-going vessels from the head of the Passes to the Port of New Orleans and return, and thereafter there shall be not less than 20 such pilots.

Section Four of Act 54 of 1908 is the source of the issue of unconstitutionality here presented. That Section provides as follows:

> "That whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold ex-

aminations, under such rules and regulations, and with such requirements as they shall have provided, with the Governor's approval, provided that no applicant shall be considered by said Board, unless he submits proper evidence of moral character and is a voter of this State, and shall have served six months' apprenticeship in his proposed calling, and upon the certificate of the Board to the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies".

As was said in *Steamship Company v. Joliffe*, 2 Wall. 450, 456:

> "'The object of the regulations established by the statute was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation.'"

Section 6 of Act 54 of 1908, provides as follows:

> "Said river port pilots may form themselves into an association or associations, as to them may seem fit, not in conflict with law or the rules and regulations of the river port pilot commissioners."

The substance of the complaint is that the law provides that before one may be commissioned as a pilot, he must serve an apprenticeship, and that unless he is admitted as an apprentice to the Crescent River Port Pilots

Association, there is no way of serving an apprenticeship, so that the Crescent River Port Pilots Association has within it the power to choose those whom they desire to become pilots. The appellants complain that they were not chosen as apprentices and, consequently, had no means of serving an apprenticeship, and thereby satisfying the requirements of the statute that they should serve an apprenticeship of six months.

THE CONSTITUTIONAL QUESTION.

The constitutional question posed is whether or not the Fourteenth Amendment to the Constitution gives appellants the right to demand of the Crescent River Port Pilots Association that they be chosen as apprentices in order that they might be commissioned as pilots. Inherent in that question is the right of the State of Louisiana to provide that only one who has served an apprenticeship may be commissioned as a pilot. Obtruding from that question is the further question as to whether the difficulty of the appellants in serving an apprenticeship makes the statute unconstitutional. Reduced to its lowest terms, the appellants contend that the State of Louisiana, if it provides that as a condition precedent to being commissioned a pilot, one must serve an apprenticeship, that the State must provide the means of serving the apprenticeship, when there are existing private means, or else the statute is an unconstitutional nullity. The Court must answer the question as to whether mere difficulty of achieving office is a ground for denying the well recognized sovereign power of a state to regulate pilotage within its borders.

It is undeniable that Congress has permitted the states to regulate pilotage insofar as such regulation does not trench upon the supreme power of Congress over pilotage as a part of interstate commerce. Congress has never imposed a limitation upon the states as to the measures chosen for state regulation of pilotage. It has left to the states the choice of means for such regulation. No case has ever declared that one has a constitutional right to become a pilot. No case has declared that states are limited in their choice of means for such regulation. The jurisprudence of this country has recognized the difficulties and dangers within the regulatory field, and has permitted the states a wide choice of the mechanics of regulation. Such regulation is a practical matter, based upon considerations of experience in the avoidance of danger, and the way in which best the public welfare may be served. Pilotage has always been considered from time immemorial as a calling different from any other calling and requiring measures of regulation wholly apart from the measures of regulation within other fields.

THE HISTORY OF PILOTAGE.

The history of pilotage is as old as the history of commerce between nations. Compulsory pilotage was known to Rome and Carthage. It existed prior to the Ordinances of the Hanseatic League passed in 1457. Sweden in the sixteenth century knew compulsory pilotage and its recognized principles continued to be accepted up to the first Congress of the United States and up to the present day.

By the Act of August 7, 1789, Section 4, Congress of the United States recognized the power of the various states to regulate pilotage. It also realized that conditions of navigation were not uniform throughout the then newly formed United States and although it had the power, as a part of commerce, to regulate pilotage in the various states, it provided, by the act of August 7, 1789, the following:

> "That all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with existing laws of the states respectively wherein such pilots may be, or with such laws as the state may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress".

The State of Pennsylvania, in March, 1803, passed a law compelling ships and vessels of a burden of seventy-five tons or more, navigating the Delaware River, to take a pilot. The act provided that, should the master of any vessel navigating those waters refuse the services of a pilot when offered, such master shall forfeit the sum of $60.00. Cooley, the master of a vessel, who had been compelled to pay half pilotage fees under this law, sued the Board of Wardens of the Port of Philadelphia for the recovery of money so paid. The court held that the State of Pennsylvania had the power to legislate regarding pilotage because Congress had not exerted its authority over that field of regulation, but had left it to the states.

In *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 Howard 299 (143) (Decided December, 1851), the Court said:

"'Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress that the nature of this subject is such that until congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. It manifests the understanding of congress at the outset of the government that the nature of this subject is not such as to require its exclusive legislation. The practice of the states and the national government have been in conformity with this declaration from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of its superior fitness and propriety, not to say absolute necessity of different systems of regulations, drawn from local knowl-

edge and experience, and conformed to local wants' ".

* * * * * * *

"'We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quae frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; * * *"

In that case, the half-pilotage or penalties was to go to the support of widows and orphans of pilots. It was urged that this was a revenue statute instead of a regulation under the police power of the state. The court denied the contention and stated that his services were necessary in aid of navigation. The fact that the fund was dedicated to the support of widows and orphans of pilots was in recognition of the fact that at all times they were subjected to danger. It has been the practice of pilots, before the formation of associations, to put far out to sea and to proffer their services. The rivalry engendered between

individual pilots increased the danger to which they were normally subjected. It frequently happened that because of the inability of a pilot to return to shore, because of a lack of facilities, the boarded vessel carried him across the seas. In that situation, the families, for want of support, became destitute, and a charge upon the state. The formation of associations of pilots to destroy competitive rivalry and afford proper means of boarding vessels and returning to land, gave rise to the creation of associations of pilots. These associations were recognized and encouraged by statutes.

Ex Parte McNiel, 13 Wall. 236, sketches pilotage services, the dangers to which pilots are subjected and the need of governmental regulation. In that case, Banter, a pilot commissioned by the State of New York, libeled the "MAGGIE McNIEL" on the ground that he was the first pilot to tender his services to pilot the vessel by way of Hellgate to the Port of New York. He recited that the master refused his services and refused payment provided under the statute of New York. The constitutionality of the statute was attacked by McNiel on various grounds, but each of these grounds was repudiated.

During the course of the decision, the court said:

> "It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half-pilotage, as it is called, is a necessary and usual part of every system of such provisions. Pilots are a meritorious class, and the service in which they are engaged is

one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment.

* * * * * * *

THERE IS A LEGAL PRESUMPTION OF CONSTITUTIONALITY.

It must be conceded as a legal presumption that the Legislature of Louisiana, in enacting Act 54 of 1908, was guided by practical considerations. This presumption is re-enforced by the facts. The decision of the Louisiana Supreme Court was based upon the question of law as to the unconstitutionality of the statute as presented by the pleadings. The matter never reached a trial upon the facts, so that this court is without a knowledge of the facts upon which rests the legislation.

> "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way. *Otis v. Parker, supra.* Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legisla-

tion of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for over-throwing the statute'. *O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 257".*

Williams v. Mayor, 289 U. S. 36.

We believe we have the right to inform the court of the facts upon which the Legislature acted since the decision of the Supreme Court of Louisiana dealt only with the terms of the statute, and the record here contains no facts. This Court cannot reach a proper decision without a knowledge of the facts in the field over which the statute operates. The facts are indisputable and are here stated for the consideration of the Court.

HOW PILOTS OPERATE.

Since 1857, the Legislature of Louisiana has regulated pilotage from the Gulf of Mexico, through the Passes, and into the Mississippi River. It enacted Act 63 of 1877, Extra Session, and there was formed an association known as the "Associated Branch Pilots." It was necessary for these branch, or bar pilots, to own a boat, which went into the Gulf of Mexico and met incoming ships. The boat of the branch pilots was maintained by the Association, because no individual pilot could afford the costs of a boat going into the Gulf of Mexico and its maintenance and upkeep. Without the possession and use of such a boat, the functions of the bar pilots could not be properly performed.

Prior to Act 54 of 1908, there was no association of pilots piloting vessels from Pilot Town to the Port of New Orleans. The branch pilots met the ships in the Gulf of Mexico and piloted them over the bars which form at the convergence of the Mississippi River with the Gulf of Mexico. The branch pilots piloted the ships to Pilot Town, at which is located their main station. From there the ships were taken up the Mississippi River to the Port of New Orleans by unregulated river pilots. The river pilots had no association, with the result that the facilities for the performance of their duties were limited. A small number of pilots might form an association, in the nature of a partnership, but these pilots were under no system of regulation.

In 1908, the Legislature enacted the statute under attack, whereby it created the Board of River Port Pilot Commissioners to recommend to the Governor applicants for commissions as pilots. This act was in substance like Act 63 of 1877 under which the Associated Branch Pilots was created. The Legislature recognized the need of an integrated association, whose members could be controlled by a central authority, and authorized the commissioned pilots to form themselves into an association. Under the authority of Act 54 of 1908, an association named the "Crescent River Port Pilots Association" was created. The charter members made a contribution of capital, which was used in the acquisition of a pilot station and boats needed for the operation of the pilots.

At Pilot Town, there was erected and maintained a station. Pilot Town is approximately ninety miles from

the City of New Orleans. Pilot Town is nothing more than a collection of small buildings, built on stilts or piling driven into a swamp. The members of the Association, when on turn at Pilot Town, either live in the building of the Association, where they take their meals, or, some few have small buildings near the main house. Pilot Town can be reached by the Mississippi River. There is no road leading from the City of New Orleans to Pilot Town. There is a very bad country road leading from New Orleans to Venice, about 8 miles above Pilot Town, and in order to reach Pilot Town from Venice, it is necessary to take a boat. This situation compels, or at least impels, the river pilots to remain on the station between the time they arrive with an outgoing vessel, and the time they take an incoming vessel from Pilot Town to New Orleans. Pilots frequently remain on the station for several days at a time and are confined to very close quarters. They lead a common life and are thrown in intimate contact because of their inability to do otherwise. There is a general grocery store at Pilot Town which, for some of the pilots, serves as a kind of club.

No appellant before this Court has the constitutional right to eventually become a member of a community into which he might not be readily assimilated, but would forever afterwards remain as a foreign element, productive of strife instead of harmony. The usual qualities of human life do not make the need of serving an apprenticeship under the given conditions arbitrary and capricious, but, on the contrary, recognize human impulses and the qualities that make living in peace possible.

In the City of New Orleans, the Association maintains an office. This office operates for twenty-four hours a day, so that any ship requiring a pilot may telephone, and the pilot on turn is notified in time for him to reach the ship for the hour of sailing. Frequently, pilots are called at various hours of the night and the pilot next on turn must keep in constant contact with the office, so that he may be readily available when needed.

There is a Board of Directors of the Association, which regulates the conduct of the pilots. If a pilot fails to report at a ship when it is his duty to do so, he is disciplined; if he is negligent in the performance of his duty, he is subject to punishment; if he is guilty of gross misfeasance, he is severely punished. The punishment, of course, is commensurate with the offense, but the power of punishment which inheres in the Association is a means of keeping the members of the Association in line. There is a pension system, designed to permit the retirement of pilots when they become incapacitated or, for any reason, incompetent in the performance of their duties.

It must be readily apparent that the action of the Legislature in passing Act 54 of 1908 was not arbitrary or capricious, but that it envisioned the needs of regulation, and the methods by which such regulation should be achieved. It must be easily seen that the means of regulation rest upon solid foundations. None of the appellants presumably could, as individuals, maintain an office with the needed help to afford service to shipping at all hours of the day and night. Conceivably, no individual appellant could afford the purchase and maintenance of a pilot

boat needed to take the pilot from shore to ship. No individual pilot not subject to the power of punishment of an association, could be counted upon to respond to the call in weather good and bad. If left to his own devices, it might be readily conjectured that when conditions were favorable, he would respond to the call, but when conditions were bad; he might conceive some excuse for not taking out a ship. The piloting of a vessel on the Mississippi River during periods of fog, is one of difficulty and danger. Collisions have caused the loss of lives of both pilot and vessel crews because of the dense fog under which ships were moving, so that a pilot not subject to control by an Association might choose the good and avoid the bad.

The Supreme Court of Louisiana doubtless took judicial cognizance of the operations of pilotage under Act 63 of 1877 and the operations under Act 54 of 1908 in deciding the constitutionality of the latter act and of Act 134 of 1942. This Court does not have judicial knowledge of those facts and we, therefore, feel justified in their recital, with the thought that if they are not properly incorporated in the brief, they will be disregarded.

THE CONTENTION OF APPELLANTS.

The complaint here is that because the Crescent River Port Pilots Association has the only equipment and organization for training apprentices, that, therefore, the challenged legislation is unconstitutional. The statute does not say that only those serving apprenticeships under the direction of the Crescent River Port Pilots Association, shall be eligibile to commissions as pilots. It provides for

an apprenticeship, but does not designate the Crescent River Port Pilots Association as the sole means of serving that apprenticeship. The real cry of the appellants is that, because of practical conditions, they cannot serve an apprenticeship, and, consequently, cannot be commissioned as pilots. The attempted destruction of the legislation rests upon the difficulty of the appellants in satisfying a requirement for a commission as pilots. While, of course, it might be difficult for those desiring to become pilots to equip themselves with the needed boats and secure some pilot under whom they can serve an apprenticeship, yet, legally, that is not impossible. To substitute difficulty for impossibility as a mean to undermine the choice of legislation is to deny the power of the State in choosing means of regulation.

The Legislature authorized the commissioned pilots to organize themselves into an association. By such authorization, it recognized the fact that the individual pilot could not serve the general welfare as well as an association of pilots. Pilot Associations were not unknown to the Legislature, because such associations have existed from time immemorial. The need of a pilot boat, the need of men to man the boat to enable the pilot to board the ship and return the pilot to land, must have been known to the Louisiana Legislature when it enacted the challenged statute. No man could himself alone perform all of the acts requisite for a pilot to board a ship and return to shore. There must be a pooling of resources and that need was recognized by the authority to the pilots to form themselves into an association.

In granting the authority to form an association, which was a special grant, apart from the general statute for the formation of corporations, the Legislature doubtless recognized that the members of this Association live in such close community that they would want to choose those with whom they must, for a large part of their lives, live with. It did not impose upon those commissioned, as a condition precedent to forming the association, the obligation to admit into the association specified individuals. It did not say to the Association that it must admit as apprentices those possessing specified qualifications. It left to the members of the Association the choice of those whom they were willing to train for the possibility of being commissioned. Presumably, the Legislature thought that the members of the Association were best fitted to select those whom they desired as apprentices who might thereafter live almost a family life.

Your Honors can readily appreciate that if everyone who desires to become an apprentice was entitled to do so, and to share the daily lives of the commissioned pilots, that there might be introduced into the group men of different temperament, men of differing habits and conflicting views. This Association is not merely an association of men in a common calling with divergent ways of life, but is an association of men who, for many days, must live under the same roof, must share a community life and must fit themselves into that life, so that harmony and not strife shall be the order of their living.

A statute does not become unconstitutional merely because it has created a condition of affairs which pro-

hibits, except on stated conditions, the engagement in an occupation which is lawful, but subject to regulation in the public interest. If the provisions of such a statute have a reasonable relation to the object of their enactment this Court said:

> "Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77, and see, generally, *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (p. 659), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'" *Bayside Fish Co. v. Gentry*, 297 U. S. 422, 427-428.

AN ANALYSIS OF THE COMPLAINT.

An analysis of the complaint shows no violation of any of the provisions of the Fourteenth Amendment, nor a denial of any right guaranteed to the appellants by that Amendment. An analysis of the petition demonstrates these contentions. It is, therefore advisable to take up, paragraph by paragraph, the grounds of complaint alleged by the appellants.

After stating their status, the complaint proceeds as follows:

(1) In Paragraph 1, the petitioners allege that they are licensed river pilots, holding pilot licenses from the United States, and that they are well experienced and well qualified to act as pilots on the Mississippi River.

Nothing here stated asserts any constitutional right to be commissioned as a pilot.

(2) Paragraph 2 merely alleges that Act 54 of 1908 is unconstitutional, but no grounds are stated in that paragraph.

(3) Paragraph 3 alleges that Act 54 of 1908 provides for the appointment of a Board known as the "Board of River Port Pilot Commissioners for the Port of New Orleans" and for the commissioning of twenty-eight pilots to

> "be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels"

and that whenever there exists a necessity for more pilots, the Board of River Port Pilot Commissioners shall hold examinations of applicants for appointment.

This paragraph is merely a recital of the act. The appellants do not set out that there is a need of more river port pilots and that there is a need to hold examinations. However, a complete answer to any legal question raised by this paragraph, is that there is not shown that there is

a need for more river port pilots, and that the Board of River Port Pilot Commissioners have failed in their duty to so declare if there be such a need. The answer to the contentions implicit in that paragraph is that if the Board of River Port Pilot Commissioners is derelict in its duty in failing to declare the need for more pilots, if such need exists, and in failing to hold examinations, these are mere derelictions on the part of the Board of River Port Pilot Commissioners. The failure of an officer to perform his duty does not render a statute unconstitutional. If there be failure of performance of duty, the remedy is executive, or legislative and not judicial by a declaration of unconstitutionality. Under the statute under attack, the Governor may remove these Commissioners for cause and certainly a failure to carry out the duties imposed by the act would be cause for removal. The failure to invoke the executive power of the Governor is no substitute for successfully claiming the unconstitutionality of the statute appointing the officers. The remedy, if any be needed, is to compel by the compulsion of the Court the performance of their duties by the Commissioners.

(4) Paragraph 4 sets up that under Act 54 of 1908, pilots commissioned by the Governor have the exclusive right to pilot vessels from the Passes to the Port of New Orleans, and that Act 134 of 1942 extends the exclusive jurisdiction of the commissioned pilots to include the Port itself.

Nothing therein said vitiates the constitutionality of the statute under attack. The right of a state to create a monopoly of pilotage by limiting the number of pilots,

has never been questioned. The limitation is not one of grant to individuals to eliminate competition, but is for the good of the State, so that pilots may be fairly remunerated for their services, and because of such remuneration thereby attract a better class of men.

(5) Paragraph 5 alleges the law is unconstitutional because:

> "It contains no provisions for competitive examinations and lays down no rules for the Board to follow in the commissioning of pilots, but, on the contrary, the act vests in the Board arbitrary powers in that connection."

This paragraph contains no facts which show the action of the Board of River Port Pilot Commissioners to be arbitrary. It, however, does contain a misconception of the statute because the Board of River Port Pilot Commissioners has absolutely no power to commission anyone. The Governor alone has the power to commission pilots. The Fourteenth Amendment does not nullify a statute because competitive examinations for commissions are not required. Pilots properly commissioned

> "have been held by this court to be state officers. 14 Ann. 7, 33 Ann. 230". (*Levine v. Michel*, 35 La. Ann. 1121).

There is nothing in the Constitution of the United States that requires that a statute providing for the creation or appointment of officers is unconstitutional, if it does not provide for competitive examinations. The method of choosing state officers is wholly within the purview of the powers of the State.

(6) Paragraph 6 alleges:

> "The defendant board has always assumed and exercised arbitrary authority in respect to the commissioning of pilots. No examinations have ever been held by the defendant board. Appointments have always been made on a personal basis—the appointee being first "elected" by vote of the members of the Crescent River Port Pilots' Association, an organization composed exclusively of commissioned river pilots".

It further alleges that in a vast majority of cases, the appointees have been kinsmen of one or more of the pilots, and membership as a commissioned pilot has been closed by the defendant board to all except those having the favor of the pilots themselves. No single word of this paragraph points to the unconstitutionality of the questioned statute.

If the Board of River Port Pilot Commissioners has acted unfairly, to the prejudice of the appellants, the remedy lies, either with the Governor, or the courts, to compel the performance properly of its duties by the Commission. No act or acts of the commissioners can strike with unconstitutionality a statute validly enacted by the Legislature. If it were otherwise, the constitutionality of a statute would rest upon the conduct, good or bad, of those charged with its administration.

Appellants cannot complain because the Governor, in the exercise of his authority, appoints those who are closely related to other pilots, instead of ignoring such rela-

tionship, and appointing the appellants. It must be conceded that the appellants have no vested right to appointment as pilots, and, consequently, cannot complain because the Governor choses to appoint others as pilots. The Legislature has conferred upon the Governor an unlimited choice and that choice cannot be restricted judicially, in defiance of the Legislative purpose to permit the Governor an unlimited choice. Whomever he chooses to appoint comes within the purview of his powers, and even though the appointment may be the subject of criticism, yet, if the appointee comes within the terms of statutory eligibility, the courts cannot interfere with the appointment. The reasons which move the Governor to the appointment are beyond inquiry by the courts.

(7) Paragraph 7 gives a list of those who have been commissioned pilots in 1938 and in 1944, and alleges their relationship to pilots then commissioned and to former commissioned pilots.

If those who have relatives in the Association are fortunate enough to be commissioned, the statute, expressing a legitimate power of the State, is not rendered invalid. Everyone cannot be commissioned as a pilot when there is a limit on the number of pilots. It is no function of the court to substitute its judgment as to who should become an officer of the State for the authority of the Governor.

While time cannot give the accolade of constitutionality to a statute, yet, when a statute is assailed, the existence of like legislation over long periods may be considered one of the badges of constitutionality. When

statutory enactments affecting the general public have remained unassailed for a long period of time, while freedom from attack may not endue the statute with constitutionality, yet it may be a decisive factor in deciding as to whether or not the legislation is capricious and arbitrary. Where legislation has endured for a long period of time, and unassailed practices have grown up thereunder, courts are inclined to conclude that the choice of methods of regulation is neither capricious nor arbitrary. The force of reasoning forces the conclusion that if such legislation were capricious in choice and arbitrary in enforcement that complaint would have been made of the wrongful nature of the statute.

Act 54 of 1908 was modeled after Act 63 of 1877, which is the statute regulating the bar or branch pilots. Under Act 63 of 1877, the commissioned pilots were authorized to incorporate themselves, and under that authority, a corporation known as "The Associated Branch Pilots" was created and has since operated.

Under Act 54 of 1908, the Crescent River Port Pilots Association has operated under like circumstances as "The Associated Branch Pilots". Neither the legislation creating "The Associated Branch Pilots", nor the operations or practices under that statute have been the subject of attack. When the Legislature enacted Act 54 of 1908, it had before it the experience and the history of the operations under Act 63 of 1877. It was advised, therefore, that there had been no complaint against the enactment of Act 63 of 1877, and, therefore, was justified in

believing that no rights of others had been invaded, or else there would have been complaints through the courts. As a principle of law, it was, therefore, justified in adopting Act 54 of 1908 modeled after Act 63 of 1877.

(8) Paragraph 8 merely amplifies the contention that most of the commissioned pilots are related to other pilots.

The same answer is controlling here. The appellants have no constitutional right to be chosen as pilots and be commissioned by the Governor in preference to those who have been commissioned.

(9) Paragraph 9 alleges that some of the petitioners have made formal application to the defendant Board to be considered as applicants for the examination, but that their applications were ignored.

If these applicants have any vested right to be examined as to their competency, or if the Board of River Port Pilot Commissioners failed in their duty, the remedy is to compel these commissioners to hold the examination, or to appeal to the Governor for their removal for non-feasance. Those simple remedies cannot be substituted by over-turning a statute of the State on the ground it violates the Fourteenth Amendment. The appellants have no right under the Fourteenth Amendment to demand that they be examined. Dereliction of duty by the Board of River Port Pilot Commissioners does not generate the unconstitutionality of a statute under which they have been appointed.

(10) Paragraph 10 alleges that heretofore the appellants could not pilot between the Port of New Orleans and Pilot Town, except the pilotage of coast-wise vessels, and that their former right to pilot in the Port of New Orleans was abrogated by the Amendment by Act 134 of 1942. They allege that by that Amendment, they are not able to pilot foreign trade vessels within the port, and that there is not sufficient pilotage of coast-wise vessels to and from Pilot Town, so that they are deprived of earning a living. Pilotage is not the only means of earning a living. However, the Amendment does not prevent them from piloting coast-wise vessels, but simply reduces the field in which they may operate. The reduction of the field of their operations cannot render the act unconstitutional since the Legislature had plenary power to pass the act and to limit the field of operations.

Under Act 63 of 1877, the Legislature mapped out the route over which the branch pilots were to operate, and there was no challenge to its power so provided. Under Act 54 of 1908, it prescribed the route over which the river pilots were to operate. There was no challenge to the exercise of that power, long recognized by the courts of the country.

In enacting Act 134 of 1942, it exercised no greater power than it had exercised in the legislation of 1877, and in the legislation of 1908. If it had the power and the authority to pass these two prior acts, it had an equal power to regulate the practice of pilotage within the Port of New Orleans. That power is undeniable, and, as was said in *Olsen v. Smith, supra*, it is one constitutional belonging

to the states. As was said in that case, the complaint was not against the constitutional power of Texas, but was against what the appellants claimed to be an unwise use of such power. The complaint here does not deny the sovereignty of the State of Louisiana over pilotage, but questions the nature of the legislation as making it difficult, but not impossible, for the appellants to be commissioned as pilots. The test of the constitutionality of the statute is not how it affects an individual, but whether or not the Legislature of Louisiana had the authority to create the statutes. The question of wisdom or unwisdom in the enactment of a statute may be gauged by the fact that two like statutes have operated without complaint since 1877 and 1908 respectively. The justification for the act of 1942 has its source in the two prior acts regulating pilotage between the Port of New Orleans and to the Gulf of Mexico. Since the State had the right to create these two pilotage routes, it had the right to regulate pilotage within the harbor of New Orleans. Doubtless experience after 1908 demanded the need of regulation provided by Act 134 of 1942.

The law of Louisiana provides that the Governor may commission pilots only when there has been certified to him by the Board of River Port Pilot Commissioners, the need of additional pilots. The complaint fails to show such a certification of the need for additional pilots and thereby put in operation the power of the Governor to commission pilots and their alleged right to a commission. If there are no vacancies to which the appellants might be appointed, then, there are no commissions denied them since the power of the Governor to commission any one of

the appellants as a pilot is non-existent. However, even if there be additional pilots required, it is not shown that even if they had the ability to successfully pass the examinations, *that the Governor must appoint any one of them as a pilot.*

Certainly, there is nothing to show that all of them could be appointed, under the most favorable conditions, because it might readily be conjectured that the Board of Commissioners would certify the need of one or two pilots, whereas there are seven appellants. Could any court say which one or two of these appellants are entitled to a vacancy and be commissioned as pilots? If the Board of Commissioners should certify that only two additional pilots are needed, could any court dictate to the Governor which of two needed pilots should be commissioned from among the seven appellants? If the court could not command the Governor to an appointment of two out of seven of the appellants, then, can it command him to the appointment of any person from among the general public. If a court could command the Governor, in case of two existing vacancies, to appoint two designated appellants out of the seven, then, what right could the others assert? They would have no right then, and so can have no right now. If five or six out of seven have no right to one or two vacancies, has any of them the right to stand before the Court and claim the unconstitutionality of the statute? They do not belong to a class entitled to be commissioned, since they do not assert any power to create vacancies which presently do not exist, and do not have the right, under the statute, to be appointed to non-existing vacancies. Since

they cannot question the right of the Legislature to provide for a limitation of the number of pilots, they show no right which can be asserted in a court of law to emasculate the power of the Louisiana Legislature in the creation of methods for regulating pilotage.

It is fundamental in reason and in the law that they have no vested right to be commissioned by the Governor as an officer of the State, or to operate over any given course. It must be conceded by a long line of authority that the State has the right to regulate pilotage and where the statute infringes on no constitutional right, it is beyond attack. The right of a state to limit the number of pilots, or the routes over which pilots are to operate has long been recognized and never seriously doubted in the jurisprudence of the courts of the United States. The complaint of the appellants in no way states an invasion of their constitutional rights, because nowhere do they show the guarantee of a right to become a pilot over a given route or designated area.

Analyzed, the complaint is merely that the Board of River Port Pilot Commissioners has failed to properly perform its duty. However, it is clear that the failure of an officer to perform his duty is not an infirmity of the statute by which he was appointed, so as to make the statute unconstitutional. The remedy of the appellants is to appeal to the courts for the enforcement of the duties of the Board of River Port Pilot Commissioners, or to apply to the Governor for their removal, and failing in either or both places, seek legislative correction. The Legislature has the power of decision and it is in that forum

that the cry of the appellants should ultimately be raised in case of failure in other places.

> "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right. *Tyler v. Judges*, 179 U. S. 405; *Plymouth Coal Co. v. Penn.*, 232 U. S. 530, 544; *Lehon v. City of Atlanta*, 242 U. S. 53, 56;" *Akins v. Kingsbury*, 247 U. S. 484, 489.

Has such a showing been made by these pleadings when the complaint shows that the wrong asserted, in substance, is not the exertion properly of the power of the state but the conduct of its officers.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The case is ruled by *Olsen v. Smith*, 195 U. S. 332, and *Ring v. Oregon*, 276 U. S. 607. *Olsen v. Smith*, affirmed the constitutionality of a Texas statute which, in substance, is the same as the legislation under attack here. *Ring v. Oregon* came here on error to the Supreme Court of the State of Oregon, upholding the constitutionality of a similar statute. It was argued here on December 13th and 14th, 1927, and was decided on March 19, 1928, by a *per curiam* opinion reading:

> "Affirmed on the authority of *Olsen v. Smith*, 195 U. S. 332, 342, 343, 345."

Olsen v. Smith, supra, sustained the power of the State of Texas to enact regulatory legislation. The Texas

law, like the Louisiana law, provided that the Governor of the State should appoint "a Board of five persons of respectable standing, to be known as Commissioners of Pilotage". To the Board was confided the power to fix charges to "regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, suspend them until the Governor shall act in the matter." Upon the Governor is conferred the authority to appoint such number of branch pilots as may, from time to time, be necessary, each of whom shall hold office for two years, "*subject to removal by the Governor at pleasure,*" and anyone who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots.

The difference between the Texas law and the Louisiana law is that the Board of River Port Pilots Commissioners is composed of three members, whereas the Texas Board was composed of five. The nature of their powers and duties is substantially the same. The term of appointment of the Texas pilot is for two years. Noteworthy of that statute, however, is that each of the pilots so appointed "is subject to removal by the Governor at pleasure". The attack upon that law included an attack upon its constitutionality as being violative of the Fourteenth Amendment of the Constitution of the United States.

The court, in disposing of the attack made by Smith and others upon the law which prevented them from pilot-

ing the vessels, except in conformity with the statute, among other things, said:

> "It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justi-

fied such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises".

In the reply brief of appellants on the motion to dismiss, it is said that appellants, with insistence and vehemence, say that *Olsen v. Smith, supra,* when considered, does not support the contention of the appellees. It is said that in order to understand the decision in *Olsen v. Smith, supra,* the jurisprudence leading up to its decision must be reviewed. The opinion in *Olsen v. Smith,* speaks for itself and this Court does not need the enlightenment of a decision by the Texas court. *Olsen v. Smith,* by its reasoning and principles, supports itself without the need of aid by the courts of Texas.

Counsel quoted at length from *Petterson v. Board of Commissioners,* 57 S. W. 1002, in which the Texas statute was attacked by the plaintiff on the same ground as is urged here. During the course of the opinion, the court adverted to the fact that pilots were permitted to choose deputies, who subsequently became eligible for commissions as pilots. During the course of the opinion, the court said that the requirement that the applicant should have served an apprenticeship, if directory, did not nullify the statute, and said that "it seems to be so", and the Governor could ignore it. Just how the court reached the conclusion that the prescription of the Legislature for an

apprenticeship could be ignored by the Governor is not supported by any reasoning. This case was not appealed.

When *Olsen v. Smith, supra,* came before the Texas court, the legislation was upheld, but was not upheld upon the theory that the provision for an apprenticeship was merely directory, subject to being disregarded, and was, therefore, not mandatory.

In *Olsen v. Smith,* the Texas court said:

> "The assignments are in substance, that our statute violates section 1 of the Fourteenth Amendment of the Federal Constitution, and Section 19, Art. 1, of our State Constitution, in prescribing the qualifications and regulating the appointment of branch pilots. Upon this subject much might be written. But in view of the universality of such laws, and their long observance and enforcement in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation. *Steamship Co. v. Joliffe,* 2 Wall. 450, 17 L. Ed. 805. The subject comes fairly within the scope of governmental or police functions. We consider the case of *Petterson v. Board,* (Tex. Civ. App.) 57 S. W. 1002, as deciding the question raised by these assignments against the contention of appellant".

Your Honors will, therefore, see that in deciding *Olsen v. Smith, supra,* the Texas court in its reasoning, did not rely upon the reasoning of *Petterson v. Board,* but

turned to the universality of laws regulating pilotage and the object of such laws as the basis of the decision. The Texas court had already upheld the constitutionality of the Texas statute, and it was, therefore, proper to refer to the case in which the validity of the statute had been declared. However, it is a universal rule that a court, supporting the validity of a statute by a prior decision, does not necessarily adopt the reasoning upon which the decision rests. The decision and not the reasoning is the law. It frequently occurs that the constitutionality of a law is declared by differing reasoning, expressed in concurring opinions. Neither the reasoning of the original opinion, nor the reasoning of the concurring opinion is the law of the case. The law of the case is the decision of constitutionality, or of unconstitutionality, reached possibly by different roads of reasoning. It follows conclusively, therefore, that the case of *Petterson v. Board* has absolutely and utterly no place in the argument of this case.

The reasoning of *Olsen v. Smith*, *supra*, which does not include the reasoning of *Petterson v. Board*, may be related to the reasoning of this court in its final decision, but it must be apparent that only the reasoning in *Olsen v. Smith* decided here, is of any consequence in the present argument. It may well be that the constitutionality of the Texas statute was sustained by this court by wholly different reasoning, but regardless of the modes of reasoning, the decision here in *Olsen v. Smith* should conclude the issue.

Bradwell v. The State, 16 Wall. 130, 142:

The Fourteenth Amendment is not the means of fulfilling every desire to engage in a particular occupation. Many occupations are beyond the limitation of the Fourteenth Amendment. The Fourteenth Amendment was designed to protect the elemental rights which belong to one as a human being, but was never intended, nor does it guarantee, the fulfillment of every wish of the citizen. The power of the State to regulate many occupations and, through such sovereign power, to deny entrance to certain fields of endeavor is axiomatic. *Bradwell v. State, supra,* exemplifies the legal concept and demonstrates its application. In that case, Mrs. Myra Bradwell applied to be admitted to the Illinois bar. For no greater reason than that she was a woman, the Supreme Court of Illinois refused her admission as a member of the bar. She applied to this court, urging that the action of Illinois was arbitrary and denied her a right guaranteed by the Fourteenth Amendment.

The court in denying her any relief said:

> "The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age,

sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States."

In Re Lockwood, 154 U. S. 116:

Bradwell v. The State was not a vagrant expression of principle but a stated conclusion as to the meaning of the Fourteenth Amendment. It was followed in *In Re Lockwood*, 154 U. S. 116. Belva A. Lockwood applied to be admitted to the Virginia bar, but was denied admission by the Supreme Court of Virginia, and in her application to this court "she alleges that the only reason for the rejection of her application was that she is a woman."

If under the Fourteenth Amendment she had a right to be admitted to the Virginia bar, the refusal of admission

on the grounds she was a female would not be a constitutional ground. If under the Fourteenth Amendment, she was entitled as a matter of right to be admitted to the bar of Virginia, that State could not empty the Fourteenth Amendment of its protection regardless of whether the reason was good or bad. In denying her application for a mandamus to the Supreme Court of Virginia, this court said:

> "In *Bradwell v. The State*, 16 Wall. 130, it was held that the right to practice law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."

Lehon v. City of Atlanta, 242 U.S. 53:

Reduced to its ultimate contention, the appellants claim that the State of Louisiana has chosen a wrong method of regulating pilotage and because of the choice of a wrongful method, the statute violates the Fourteenth Amendment. That the States have wide latitude in the mechanics of regulation is illustrated by the case of *Lehon v City of Atlanta, supra.* This court recognized the power of regulation in the State of Georgia of the business of carrying on a private detective agency. It recognized the fact that the public welfare is paramount to the desire of one desiring to engage in an occupation having

a direct relationship to the good of the State. The principle of the cited case is decisive here. That case and this case involve the police power and the medium of its exercise.

Lehon was convicted of failing to comply with a city ordinance, subjecting the business of a private detective to police supervision, and providing that no one shall carry on such a business without first being recommended by the Board of Police Commissioners and taking the oath of a city detective. Lehon complained of his conviction under the ordinance on the ground its requirements offended "the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States." The analogy between that case and this case is that pilots are commissioned upon the approval of the Board of River Port Pilot Commissioners. In the cited case, the recommendation lay with the Board of Police Commissioners. Each board or commission was created under the police power of the state.

The court, in holding that the requirement of the ordinance did not contravene the Fourteenth Amendment, said:

> "The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the State has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very common-place to say

that the exercise of police is one of the necessary activities of government and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the State, have the stamp of the State as to fitness and character, take an oath to the State for faithful execution of its duties and give a bond for their sanction. This the State may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other State."

The regulation of the business of a detective agency is not more important as a governmental power and duty than is the regulation of pilotage. From the earliest days of the Constitution the importance of pilotage and its regulation has been recognized by Congress and the states. If it were constitutional for the State of Georgia to permit the exercise of the business of a private detective only upon the recommendation of the Board of Police Commissioners, so, equally, the State of Louisiana has the power to permit the business of pilotage to be exercised only upon the recommendation of a Board of River Port Pilot Commissioners. Since the State of Louisiana has the power to regulate, and inherent in that power, to provide the means of regulation, the appellants in this case cannot complain of the means chosen for the exercise of the power. Once the power be admitted, the sanction for the exercise of the power lies clearly within the choice of the State. If the State ex-

ercises its right of choice, there can be no violation of a constitutional right guaranteed by the Fourteenth Amendment.

These cases so clearly expressive of the law should suffice for the decision here. It would serve no useful purpose to parade the various cases showing the power of the State to regulate various occupations free of the prohibition of the Fourteenth Amendment. One may not engage in the sale of liquor as a matter of right, but must comply with the regulations provided by the State. The Fourteenth Amendment is no open sesame to enter into the business of selling liquor. *Crowley v. Christensen*, 137 U. S. 86. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which the States are forbidden to abridge. *Bartemeyer v. State of Iowa*, 85 U. S. 129, 18 Wall. 129. A State has reserve police power to regulate occupations in which the public have an interest and the regulation of which is necessary for the general welfare. The exercise of such police power is not an abridgment of the privilege and immunities of citizens guaranteed by the Fourteenth Amendment. *Premier-Pabst Sales Corporation v. Grosscup*, 298 U. S. 226. The tendency of the courts is to recognize the good of the State and to place the general welfare above rights claimed under the Fourteenth Amendment where there is no discrimination shown. The trend of the law is to recognize the legislative power in the choice of methods conceived for public protection. *Philbrook v. Newman*, 85 Fed. 139; *Steinbach v. Metzger*, 63 Fed. (2d) 74. A law of Arizona requiring all flagmen on railroad trains to have at least one year's experience as brakemen

is not in violation of the Fourteenth Amendment as abridging the privileges or immunities of citizens. *Simpson v. Geary*, 204 F. 507.

Yick Wo v. Hopkins, 118 U. S. 356:

This case is the chief reliance of the appellants for success. They allege no discrimination against them created by the statute, but complain that the Legislature has unwisely enacted a regulatory statute. The relief, if any, to which they are entitled is legislative and not judicial. If the legislation is unwise, and works undue hardship upon any body of citizens, the remedy is in amending legislation. There is no discrimination aimed at, or practiced upon, the appellants, nor do they allege such discrimination. They allege merely an inability, because of the mechanics of the statute, to be commissioned as pilots. The difference between this case and *Yick Wo v. Hopkins, supra*, is found in the reasoning of *Gundling v. City of Chicago*, 177 U. S. 183, as follows:

> "The case principally relied upon by the plaintiff in error is that of Yick Wo v. Hopkins, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with

reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some two hundred other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

'The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such

cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature'."

What is discussed in *Yick Wo v. Hopkins* is the protection of a right guarantted under the Fourteenth Amendment to the Constitution of the United States to engage in a common calling. Pilotage is not a common calling. The statute there under attack was designated to deny to Yick Wo, by devious methods, the right to engage in the laundry business, while permitting others, under like circumstances, to so engage. The law was a discrimination against Chinamen, by denying them the right to engage in the business in which others were permitted freely to engage. Yick Wo required no commission from the Governor of California to put a gloss on shirts and collars and to carry a laundry basket. He was entitled, as a citizen, to engage, under like conditions, with others engaged in the business. The ordinance there held unconstitutional was designed and enforced to deny him his right, because he was a Chinaman. Under the Constitution, he had the same right as any other citizen to engage in the laundry business, notwithstanding he was of Chinese origin. Under the law of Louisiana, everyone is not of right etitled to become a pilot, but only those commissioned by the Governor are so entitled. The rule quoted by counsel for plaintiffs in *Corpus Juris Secundum*, supra, buttresses the distinction between the *Yick Wo* case and the case at bar.

Houston Port Pilots v. Goodwin, 178 S. W. (2d) 308, decided by the Supreme Court of Texas, is quoted at

length by appellants. The quotation aptly describes the difference between that case and the case at bar. It is said in counsel's brief, quoting an excerpt, the following:

> "The court in dismissing that allegation as the basis of a judgment in favor of plaintiff said:
>
> 'But even if one would be justified in concluding that the Board had been so unmindful of its duties and responsibilities as to surrender its judgment to the commands of the Columbia River Pilots Association, nevertheless, that circumstance alone would not entitle the petitioner to succeed. It would still be incumbent upon him to satisfy this court that he possessed the qualifications to capably discharge the duties of a pilot.'"

State v. Board of Pilotage Commissioners, 198 Wash. 695, 90 Pac. (2d) 238, is cited in support of the contention of the unconstitutionality of the Louisiana statute. The issue there was wholly apart from the issue here. In that case, the Board of Pilotage Commissioners was constituted solely for the purpose of holding examinations and issuing licenses. The court very properly said that any act

> "which would vest in the Board arbitrary power to license one applicant and refuse to license another, although qualified in every respect",

would be unconstitutional. No one doubts the force of that reasoning. The Board of River Port Pilot Commissioners in Louisiana is not empowered to grant or to withhold licenses at will. The members are commissioned solely for the purpose of holding examinations and certi-

fying to the Governor that the applicants have the requisite qualifications provided by the statute. The Governor alone, who is an officer of the State, has the power to issue the commission.

A fundamental distinction between the case at bar and the case arising from the State of Washington is that here the court is asked to declare unconstitutional a statute regulating pilotage on the ground that the Pilot Commissioners are showing favoritism. The case in the State of Washington dealt, not with the unconstitutionality of the statute under which the Board of Pilot Commissioners was acting, but the gravamen of the complaint was that although properly clothed with authority under a statute constitutionally enacted, that nevertheless, by showing favoritism, they were discriminated against. The court was asked in that case, not to declare the statute nullified by the conduct of the Commissioners, but the court was asked to compel the commissioners to hold examinations and to issue a license to the complainants, since they were by law entitled to the examination and, by the same statute, were entitled to be commissioned if found competent. The remedy invoked was mandamus. The mandamus was granted, but the statute under which Commissioners acted was not destroyed.

The distinction between the case at bar and the cited case of *State v. Board of Pilotage Commissioners, supra*, is found in the brief of appellants, who quote from the cited case to the following effect:

> "In the *Olsen case, supra*, the constitutionality of a pilotage act of the State of Texas was questioned,

> on the theory that the Legislature had no right to attempt to regulate pilotage services, as it was not subject to governmental control. This act conferred upon the Governor of the State of Texas the authority to appoint any number of branch pilots that might from time to time be necessary."

This was said in pointing out the difference between the Texas statute and the Washington statute.

Certainly, the Washington state court recognized the distinction between the case which it was deciding and the *Olsen* case, as expressed in the excerpt just recited.

State Ex Rel. Biscayne Bay Stevedoring Company v. Florida, et als., 143 Fla. 424, 196 So. 816:

State ex rel. Biscayne Stevedoring Company v. Turner, et als., is wholly inapposite here. The Supreme Court of Florida in that case was not dealing with the unconstitutionality of a statute regulating pilotage, but was dealing with improper conduct on the part of pilot commissioners, acting under a constitutional statute. In that case, the pilot commissioners refused to issue to the Biscayne Bay Stevedoring Company a permit to engage in the stevedoring business at Port Everglades, Florida. From 1936 until 1942, it had issued to the stevedoring company a permit, but in 1942, refused to grant a permit. The stevedoring company mandamused the pilot commissioners to issue the permit on the ground that their action was arbitrary and capricious, and denied them a right which should have been accorded them under the statute of Florida. They did not question the validity of the statute,

but denied the rightfulness of the conduct of the pilot commissioners. The court held that under all of the facts of the case, the stevedoring company was entitled to the statutory permit, and that the pilot commissioners had acted beyond the statute under which the stevedoring company was claiming. It, therefore, ordered the pilot commissioners to issue the permit, but in no place, declared the statute unconstitutional, nor referred to any relevant provision in the challenged statute here.

It is true that interpreting the statute, it stated the undeniable principle imbedded in *Yick Wo v. Hopkins*, 118 U. S. 356, that the right to engaged in a lawful business on equal terms with others is not dependent upon the will, caprice or any other motive of a single individual, or a group of individuals. In that case, the court recognized the fact that the pilot commissioners were animated by a desire to favor a competitive stevedoring company, and, in the promotion of that purpose, gave to relator a limited license to perform stevedoring work for Lykes Brothers Steamship Company and the French Line. This was in clear derogation of the authority conferred by the statute and the power of the court was exerted not to siphon out the power of the Legislature in enacting the statute, but, on the contrary, in carrying out the legislative purpose for a proper performance of their duties by the commissioners appointed to administer the law. *Yick Wo v. Hopkins, supra* is not related to the nature of the litigation, nor the ultimate determination of that case. The Florida case involved an interpretation of a state statute and the obligation of the officers charged with its administration to perform their duties.

Williams v. Molther, 198 Fed. 460 and *Williams v. Pope*, 215 Fed. 1000, are equally inapposite here. In each case, the applicant complained of the fact that the Local Inspectors of the United States had refused to examine the plaintiff for licensing as a pilot. There are no restrictions upon the number of Federally licensed pilots, and anyone who passes the examination is entitled to a license. In each case, the plaintiff complained that he was denied the right to an examination, which was the only requisite for securing a license. The court very properly held that the local inspectors could not, either wilfully refuse to examine the applicant nor could these local inspectors make rules not authorized by the United States statutes regulating pilotage. Here, the State of Louisiana has provided for examinations, but such examination successfully passed does not necessarily entitle the applicant to be licensed. The Governor is empowered to commission, and no restriction is placed upon his executive power to grant or withhold commissions.

Ring v. Patterson, 170 Ore. 234, 1 Pac. (2d) 1105, is quoted, doubtless with the thought of bringing the allegations of this case within the reasoning of the Oregon court. The difference between that case and this case is that the Board of Pilot Commissioners in Oregon were not empowered to issue commissions to pilots as state officers, but merely to hold examinations. It was charged that it held examinations only for those favored by the Columbia River Pilots Association, and would not grant the applicant a license unless he would become a member of that

organization. The Oregon court, in disposing of that contention, said:

> "But even if one would be justified in concluding that the Board had been so unmindful of its duties and responsibilities as to surrender its judgment to the commands of the Columbia River Pilots Association, nevertheless, that circumstance alone would not entitle the petitioner to succeed. It would still be incumbent upon him to satisfy this court that he possessed the qualifications to capably discharge the duties of a pilot."

Paraphrasing the words of the Oregon Supreme Court, we say that, even if the appellants in this case should possess the qualifications necessary to be commissioned as pilots, they would still have to convince the court that they are entitled to be commissioned by the Governor. To follow the implied argument of the appellants, your Honors would have to hold, if the appellants here could show that the Governor of the State had been influenced and dominated by the Crescent River Port Pilots Association and granted commissions to favored applicants, that fact would entitle your Honors to substitute the judicial process for administrative power and grant commissions to the appellants. Since the Legislature did not limit the choice of the Governor, nor provide that if he should listen to the urging of members of the Crescent River Port Pilots Association that the judiciary might then commission pilots, your Honors are without power to issue commissions to these appellants. Without such commissions, they are not entitled to act as pilots within the range covered by the Statute.

City of Seattle v. Gibson, 96 Wash. 425, 165 Pac. 109, is quoted in support of the contention of the plaintiff. One could not reasonably doubt the correctness of the reasoning and decision in that case. With equal reasoning, however, one might challenge its application here. In that case, an ordinance of the City of Seattle was attacked on the ground that it permitted a group of individuals to decide who should exercise the calling of a druggist in the City of Seattle. No one for a moment could question the unconstitutionality of such an ordinance and the court unhesitatingly declared it as unconstitutional.

The reasoning in *Highland Farms Dairy v. Agnew*, 16 Fed. Sup. 575, held that an act vesting a board with absolute power to grant or refuse licenses to engage in the dairy business was unconstitutional. To the same effect is *Liebermann v. Van DeCarr*, 199 U. S. 552, 26 Sup. Ct. 144.

CONCLUSION.

The appellants do not attack the power of the State to pass the act, but complain of the conduct of the Commissioners appointed under the statute. These commissioners cannot render the statute unconstitutional by dereliction of duty. These Commissioners do not have the power to grant or withhold commissions as state officers. They have only the authority to hold examinations, and to certify to the Governor the competence of those passing the examinations. If they fail to hold the examinations, the remedy is two-fold. They may apply to the courts to com-

IN THE

Supreme Court of the United States

October Term, 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

PETITION FOR REHEARING ON BEHALF OF THE APPELLANTS.

M. A. GRACE,
CHARLES A. O'NIELL, JR.,
Counsel for Petitioners.

EDWIN H. GRACE,
JAMES O'NIELL,
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BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

PETITION FOR REHEARING ON BEHALF OF THE APPELLANTS.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie, and Marion F. Short, plaintiffs and appellants in the above numbered and entitled cause,

appearing through their attorneys, M. A. Grace and C. A. O'Niell, Jr., with respect represents:

1.

That the opinion and decree rendered in this cause on the 31st day of March, 1947, is incorrect, and that a rehearing should be granted, for the following reasons:

2.

The Court concedes that Act 54 of 1908, as amended, gives the pilot board and the commissioned pilots themselves absolute control of appointments, but nevertheless holds the act to be constitutional. Equality of opportunity to persons similarly situated is guaranteed by the Fourteenth Amendment of the United States Constitution. The decision in this case is contrary to that principle and is incorrect.

3.

As stated, the Fourteenth Amendment guarantees equal opportunity to all persons similarly situated. The decision in this case narrows the equal protection guaranty, holding that to render a state law unconstitutional, discrimination based upon hostility to a "particular race, religion, beliefs or * * * other reason having no relation to the regulated activities" must be present;—which is incorrect.

4.

The court concludes that discrimination in the selection of pilots on the Mississippi River is desirable for the good

of commerce and shipping. There is no evidence in the record to support such conclusion. The case was tried out on an exception of no cause of action filed by the defendants. The defendants might have tendered such factual issue in an answer regularly filed. The plaintiffs then would have had an opportunity to present their side of the issue. But the defendants elected to try the case out on an exception of no cause of action. The only facts contained in the record are those alleged in the plaintiffs' petition, which for purposes of the exception are admitted by the rules of practice of Louisiana. *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 2d 233. The court's aforesaid conclusion is not warranted.

5.

The court implies that discrimination in the selection of pilots is sanctioned by the laws of most states. That is not correct. Equal opportunity is the rule in most states. See Oregon pilot law, Sections 105-219, Oregon Compiled Laws, Volume 7; New York pilot law, Section 17, Cahill's Consolidated Laws of New York; Georgia pilot law, Sections 80-104, 80-105, 80-106, Georgia Code of 1933; California pilot laws, Sections 1100 and 1101, Deering's California Code; Connecticut pilot law, Section 3081, Revised General Statute of Connecticut; and Indiana pilot law, Sections 42-1101, Burns Indiana Statutes of 1933. Besides, the practice of discrimination in licensing of pilots is condemned in the jurisprudence. See *State v. Board of Pilotage Commissioners*, 198 Wash. 695, 90 P. 2d 238; *Petterson v. Board of Commissioners* (Tex. Civ. App.) 57

S. W. 1002; *Ring v. Patterson*, 170 Or. 234, 1 P. 2d 1105; and *Williams v. Mollner*, 198 Fed. 460.

6.

The fact that pilotage is so thoroughly invested with public interest—so important to public safety—is all the more reason why skill, and not blood relationship, should be the test for license. The court erred in holding that the test of blood relationship for pilot licenses may be imposed by a state.

Wherefore, your petitioners pray that a rehearing be granted in this cause, and that on rehearing the opinion and decree rendered herein on the 31st day of March, 1947, and the judgment of the state court be set aside and reversed.

M. A. GRACE,
CHARLES A. O'NIELL, JR.,
Counsel for Petitioners.

EDWIN H. GRACE,
JAMES O'NIELL,
Of Counsel.

This is to certify that copies of this Brief have been served opposing counsel on this .... day of ..... 1947.

.....

SUPREME COURT OF THE UNITED STATES

No. 291.—October Term, 1946.

Marion B. Kotch, John L. Richards, Adolph Clark, et al., Appellants, v. Board of River Port Pilot Commissioners for the Port of New Orleans, et al. | On Appeal from the Supreme Court of the State of Louisiana.

[March 31, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Louisiana statutes provide in general that all seagoing vessels moving between New Orleans and foreign ports must be navigated through the Mississippi River approaches to the port of New Orleans and within it exclusively by pilots who are State officers.[1] New State pilots are appointed by the governor only upon certification of a State Board of River Pilot Commissioners, themselves pilots.[2] Only those who have served a six month ap-

[1] A ship entering the Mississippi River from the Gulf of Mexico is piloted the twenty mile distance from the mouth of the river to "pilot town" by one of a group of pilots specially familiar with the "entrance" to the Mississippi through the so-called "passes." La. Acts 1880, No. 99, § 2, La. Acts 1908, No. 55, § 1, La. Acts 1910, No. 26, § 1, 6 La. Gen. Stat. §§ 9147, 9163 (1939). Between pilot town and New Orleans, a distance of approximately ninety miles, ships are piloted exclusively by so-called river port pilots. La. Acts 1908, No. 54, § 1, 6 La. Gen. Stat. c. 8 (1939). By an amendment in 1942 the exclusive jurisdiction of the river port pilots was extended to the piloting of seagoing vessels within the port of New Orleans. La. Acts 1942, No. 134, 6 La. Gen. Stat. §§ 9155, 9156 (Supp. 1946). Appellants here sought appointment as river port pilots.

[2] Sections 2 and 3 of the Act of 1908 provided for the appointment and commissioning of twenty-eight pilots by the governor and prescribed that thereafter there should not be less than twenty. 6 La. Gen. Stat. §§ 9155, 9156 (1939).

prenticeship under incumbent pilots and who possess other specific qualifications may be certified to the governor by the board.[3] Appellants here have had at least fifteen years experience in the river, the port, and elsewhere, as pilots of vessels whose pilotage was not governed by the State law in question.[4] Although they possess all the statutory qualifications except that they have not served the requisite six months apprenticeship under Louisiana officer pilots,[5] they have been denied appoint-

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The statement of the Louisiana court in this case that pilots so appointed are considered State officers has long been the established State rule. *Williams* v. *Payson*, 14 La. Ann. Rep. 7, 8 (1859); *Louisiana* v. *Pollet*, 33 La. Ann. Rep. 228, 230 (1881); *Levine* v. *Michel*, 35 La. Ann. Rep. 1121, 1124 (1883).

From among the pilots the governor was required to appoint three River Port Pilot Commissioners. La. Acts 1908, No. 54, § 1, 6 La. Gen. Stat. § 9154 (1939).

[3] "Whenever there exists a necessity for more pilots . . . the . . . board of river port pilot commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall have provided, with the governor's approval, provided that no applicant shall be considered by said board, unless he submits proper evidence of moral character and is a voter of this State, and shall have served six months' apprenticeship in his proposed calling, and upon the certificate of the board to the governor that the applicant has complied with the provisions of this act, the governor may, in his discretion, appoint to existing vacancies." La. Acts 1908, No. 54, § 4; 6 La. Gen. Stat. § 9157 (1939).

[4] Appellants were licensed to pilot coastwise vessels to and through the port under federal law, which excludes states from controlling pilotage of coastal shipping. Rev. Stat. §§ 4401, 4444, 46 U. S. C., §§ 215, 364. Also prior to the passage of La. Acts 1942, No. 134, they had piloted all classes of vessels within the port of New Orleans. That Act deprived appellants of authority to pilot within the port and conferred it exclusively upon State river port pilots. Thus appellants allege they have been deprived of an opportunity to make a living unless they can obtain appointment as river port pilots under the pilotage law.

[5] While the Act does not specifically require that the apprenticeships be performed under incumbent officer pilots, the State Supreme Court has so construed it.

ment as State pilots. Seeking relief in a Louisiana state court, they alleged that the incumbent pilots, having unfettered discretion under the law in the selection of apprentices, had selected with occasional exception, only the relatives and friends of incumbents; that the selections were made by electing prospective apprentices into the pilots' association, which the pilots have formed by authority of State law;[6] that since "membership . . . is closed to all except those having the favor of the pilots" the result is that only their relatives and friends have and can become State pilots.[7] The Supreme Court of Louisiana has held that the pilotage law so administered does not violate the equal protection clause of the Fourteenth Amendment. 209 La. 737, 25 So. 2d 527. The case is here on appeal from that decision under 28 U. S. C. § 344 (a).

The constitutional command for a state to afford "equal protection of the laws" sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See *e. g.*, *Tigner* v. *Texas*, 310 U. S. 141, 147. Otherwise, effective regulation in the public interest could not be provided, however essential that

[6] La. Rev. Stat. § 2707 (1869), reenacted in § 4 of La. Acts 1928, No. 198, 6 La. Gen. Stats. § 9149 (1939).

[7] Appellants' complaint was dismissed for failure to state a cause of action. Therefore we consider their allegations as facts for the purpose of this decision.

Appellants' prayer had sought an injunction against interference with their serving as pilots, and, in the alternative, sought mandamus to compel the Board to examine appellants as required by law and to certify them to the Governor. The Louisiana Supreme Court affirmed the trial court's refusal to compel the board to examine appellants because they did not possess the qualifications required to take examinations—specifically, they had not served apprenticeships.

regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 106. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities. See *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, 92.

The case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, relied on by appellants, is an illustration of a type of discrimination which is incompatible with any fair conception of equal protection of the laws. Yick Wo was denied the right to engage in an occupation supposedly open to all who could conduct their business in accordance with the law's requirements. He could meet these requirements, but was denied the right to do so solely because he was Chinese. And it made no difference that under the law as written Yick Wo would have enjoyed the same protection as all others. Its unequal application to Yick Wo was enough to condemn it. But Yick Wo's case, as other cases have demonstrated, was tested by the language of the law there considered and the administration there shown. *Cf. Crowley* v. *Christensen*, 137 U. S. 86, 93, 94; *Gundling* v. *Chicago*, 177 U. S. 183; *New York ex rel. Lieberman* v. *Van de Carr*, 199 U. S. 552; *Engle* v. *O'Malley*, 219 U. S. 128, 137. So here, we must consider the relationship of the method of appointing pilots to the broad objectives of the entire Louisiana pilotage law. See *Grainger* v. *Douglas Park Jockey Club*, 148 F. 513, and

cases there cited. In so doing we must view the appointment system in the context of the historical evolution of the laws and institution of pilotage in Louisiana and elsewhere. *Cf. Otis Co.* v. *Ludlow Mfg. Co.*, 201 U. S. 140, 154; *Jackman* v. *Rosenbaum*, 260 U. S. 22, 31; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 428–430. And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. *Taylor* v. *Beckham*, 178 U. S. 548; *Snowden* v. *Hughes*, 321 U. S. 1, 11–13.

Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such.[8] In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and in some measure, the competitive attractiveness of particular ports. Thus, for the same reasons that governments of most maritime communities have subsidized, regulated, or have themselves operated docks and other harbor facilities and sought to improve the approaches to their ports, they have closely regulated and often operated their ports' pilotage systems.[9]

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[8] See generally, Report of Departmental Committee on Pilotage (London, 1911); Pilotage in the United States, Special Agents Series, Department of Commerce (1917).

[9] See *Cooley* v. *Board of Wardens*, 12 How. 299, 308, 312, 316, 326; *Ex parte McNiel*, 13 Wall. 236, 238, 239.

The history and practice of pilotage demonstrate that, although inextricably geared to a complex commercial economy, it is also a highly personalized calling.[10] A pilot does not require a formalized technical education so much as a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and conformation of the harbor or river which he serves. This seems to be particularly true of the approaches to New Orleans through the treacherous and shifting channel of the Mississippi River.[11] Moreover, harbor entrances where pilots can most conveniently make their homes and still be close to places where they board incoming and leave outgoing ships are usually some distance from the port cities they serve.[12] These "pilot towns" have begun, and generally exist today, as small communities of pilots perhaps near, but usually distinct from, the port cities.[13] In these communities young men have an opportunity to acquire special knowledge of the weather and water hazards of the locality and seem to grow up with ambitions to become pilots in the traditions of their fathers, relatives, and neighbors.[14] We are asked, in effect, to say that Louisiana is without constitutional authority to conclude

[10] For an excellent description of a pilot's life and duty, see Kane, Deep Delta Country, c. 10 (1944).

[11] See Kane, *op. cit. supra*, note 10. See also *Hearings before Committee on the Merchant Marine and Fisheries* on H. R. 9678, 64th Cong., 1st Sess., 106, 214, 229, 279 (1916) (compulsory barge pilotage).

[12] See Gieseke, American Commercial Legislation before 1789, 118 (1910); Kane, *op. cit. supra*, note 10.

[13] See Kane, *op. cit. supra*, note 10. A Louisiana statute provides that "no license shall be granted to any person to keep a tavern . . . at the Balize, South West pass or any other station for pilots, nor within three miles of such station, unless the person applying for such license shall be recommended in writing by a majority of the branch pilots." La. Rev. Stat. § 2704 (1869), 6 La. Gen. Stat. § 9166 (1939).

[14] See Kane *op. cit. supra*, note 10, 128; see also Pilotage in the United States, *op. cit. supra*, note 8, 8, 16.

that apprenticeship under persons specially interested in a pilot's future is the best way to fit him for duty as a pilot officer in the service of the State.

The States have had full power to regulate pilotage of certain kinds of vessels since 1789 when the first Congress decided that then existing state pilot laws were satisfactory and made federal regulation unnecessary. 1 Stat. 53, 54 (1789), 46 U. S. C. § 211; *Olsen* v. *Smith*, 195 U. S. 332, 341; *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187. Louisiana legislation has controlled the activities and appointment of pilots since 1805—even before the Territory was admitted as a State.[15] The State pilotage system, as it has evolved since 1805, is typical of that which grew up in most seaboard states and in foreign countries.[16] Since 1805 Louisiana pilots have been State officers whose work has been controlled by the State.[17] That Act forbade all but a limited number of pilots appointed by the governor to serve in that capacity. The pilots so appointed were authorized to select their own deputies.[18] But pilots, and through them, their deputies, were literally under the command of the master and the wardens of the port of

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[15] La. Acts (Territory of New Orleans) 1805, c. 24; see also Surrey, Commerce of Louisiana, 1699–1763, c. III (1916).

[16] Almost all the maritime states, some as colonies before the Revolution, adopted comprehensive pilotage laws which included unrestricted apprenticeship provisions. Mass. Laws, c. 13, § 2 (1783), Mass. Rev. Stat. c. 32 §§ 5–42 (1836); New York Laws, c. XVIII, §§ I, VII, X, XII (1819); Pa. Stats. at Large, c. 536, § VI (1766); N. J. Rev. Laws, c. 7, § 18 (1847); 1 Laws of Md. (Dorsey) c. 63, §§ 2, 20, 23 (1803); Code of Virginia, c. 92, §§ 4, 9 (1849); N. C. Rev. Stat. c. 88, §§ 1, 5, 14 (1837). See also Report of Departmental Committee on Pilotage, *op. cit. supra*, note 8, Part I.

[17] See note 2 *supra*.

[18] The 1805 Act required deputies to obtain a certificate from the master and wardens as a condition precedent to their appointment. But § 1 of La. Acts 1806, No. 26, gave pilots blanket authority to appoint their own deputies. Pilots were, however, made responsible for the neglect or misconduct of their deputies.

New Orleans, appointed by the governor. The master and wardens were authorized to make rules governing the practices of pilots, specifically empowered to order pilots to their stations, and to fine them for disobedience to orders or rules. And the pilots were required to make official bond for faithful performance of their duty. Pilots' fees were fixed; [19] ships coming to the Mississippi were required to pay pilotage whether they took on pilots or not.[20] The pilots were authorized to organize an association whose membership they controlled in order "to enforce the legal regulations, and add to the efficiency of the service required thereby." [21] Moreover, efficient and adequate service was sought to be insured by requiring the Board of Pilot Commissioners to report to the governor and authorizing him summarily to remove any pilot guilty of "neglect of duty, habitual intemperance, carelessness, incompetency, or any act of conduct . . . showing" that he "ought to be removed." La. Act. No. 113 § 20 (1857). These provisions have been carried over with some revision into the present comprehensive Louisiana pilotage law. 6 La. Gen. Stat., cc. 6, 8 (1939). Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage.[22]

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[19] La. Acts 1805, c. 24, § 20; La. Acts 1837, No. 106, § 9.

[20] La. Acts 1805, c. 24, § 17.

[21] *Levine* v. *Michel*, *supra*, at 1125; see also note 6 *supra*.

[22] See Kane, *op. cit. supra* n. 10 at 126–126; all of the State and colonial statutes set out in note 10, *supra*, provided for limitation on the number of pilots and fixed the fees they might charge. This is generally true today. See n. 23 *infra*.

The Department of Commerce Report, *supra* note 8 at 28 observed that: "The formation of pilots' associations was largely a result of the intense competition that formerly prevailed among the

It is within the framework of this long-standing pilotage regulation system that the practice has apparently existed of permitting pilots, if they choose, to select their relatives and friends as the only ones ultimately eligible for appointment as pilots by the governor. Many other states have established pilotage systems which make the

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pilots, ... Little effort was made to maintain definite pilot stations. Instead, the desire to be the first to speak a ship frequently led the pilots to cruise great distances from the port.

"One of the unfortunate results of the intense competition of pilots was the fact that frequently pilots could not be had when wanted, although they might be far out to sea in quest of business. Another drawback was that pilots unnecessarily exposed themselves to danger. And a third important disadvantage was that it made the earnings precarious; a pilot might earn a great deal this month and very little the next. . . .

"The pilots themselves were the first to see the disadvantages of the free or competitive system and to take steps toward the organization of associations. These associations soon developed into strong working combinations that eliminated competition and placed on an amicable basis matters that formerly produced much sharp rivalry.

"From the evidence at hand it would appear that the shipping interests as well as the insurance and commercial interests of the ports encouraged the pilots in the formation of these associations. The advantages of a well-organized pilotage system were as apparent to these interests as to the pilots themselves, for the commerce of the port was not only facilitated and expedited but made much safer by reason of the better organization of the pilotage system, which came with the elimination of competition.

"Since associations have been formed along the present lines pilotage grounds have been established. . . . These grounds are well known to mariners, who may safely count on finding there at practically all times and in all conditions of weather a pilot boat with a sufficient number of pilots aboard to accommodate any reasonable number of vessels that may come. There is little chance nowadays that a vessel will fail to find a pilot when needed. . . .

"Still another advantage of the present organization of pilotage systems is that it permits the maintenance of a central office which is in constant touch with the pilot boat and arranges for the rotation of pilots. The association generally employs an agent to look after the routine business of the office."

selection of pilots on this basis possible.[23] Thus it was noted thirty years ago in a Department of Commerce study of pilotage that membership of pilot associations "is limited to persons agreeable to those already members, generally relatives and friends of the pilots. Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation." [24]

The practice of nepotism in appointing public servants has been a subject of controversy in this country throughout our history. Some states have adopted constitutional amendments [25] or statutes,[26] to prohibit it. These have reflected state policies to wipe out the practice. But Louisiana and most other states have adopted no such general policy. We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have

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[23] See N. J. Laws 1898, c. 31, N. J. Stat. Ann. Title 12, c. 8 (1938); Pa. P. L. 542 of 1803, Pa. Stats. Ann. (Purdon) Title 55, c. 2 (1930); Md. Ann. Code (Flack), Art. 74 (1939); Del. Rev. Code, c. 35 (1935); Va. Code, c. 142 (1942); Ala. Laws, 1931, p. 154, Ala. Code, Title 38, c. 2 (1940); Ore. Comp. Laws Ann., Title 105, c. 2 (1940). See also note 16, *supra*.

[24] Pilotage in the United States, *supra*, note 8, p. 8.

[25] See *e. g.*, Mo. Constn., Art. 14, § 13 (1924).

[26] See *e. g.*, Idaho Sess. Laws, 1915, c. 10, Idaho Code Ann., § 57-701 (1932); Fla. Laws, 1933, c. 16088, Fla. Stats. Ann. §§ 116.10, 116.11 (1943); Neb. Laws 1919, c. 190, § 6, Neb. Rev. Stat. §§ 81-108 (1943); Tex. Acts 1909, p. 85, Tex. Penal Code (Vernon) §§ 432–438 (1938).

prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

The number of people, as a practical matter, who can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded. *Cf. Olsen* v. *Smith, supra;* 344, 345.[27] We are aware of no decision of this Court holding that the Constitution requires a state governor, or subordinates responsible to him and removable by him for cause, to select state public servants by competitive tests or by any other particular method of selection. The object of the entire pilotage law, as we have pointed out, is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective. See *Olsen* v. *Smith, supra; cf. Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509–510. We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments. It is enough here that considering the entirely unique institution of pilotage in the light of its history in Louisiana, we cannot say that the practice appellants attack is the kind of discrimination which violates the equal protection clause of the Fourteenth Amendment.

Affirmed.

[27] In *Olsen* v. *Smith*, the constitutionality of a Texas statute forbiding all but pilots appointed by the governor to serve was challenged by one who had not been appointed and had been enjoined from serving as a pilot. *Yick Wo* v. *Hopkins, supra*, was relied on as authority for a contention that he had been denied rights protected by the Fourteenth Amendment including equal protection of the laws. *Id.* 334. But this Court in sustaining the constitutionality of the statute, did not specifically discuss the question here raised. Therefore we do not depend upon *Olsen* v. *Smith* as a necessarily controlling authority for our decison here.

SUPREME COURT OF THE UNITED STATES

No. 291.—October Term, 1946.

Marion B. Kotch, John L. Richards, Adolph Clark, et al., Appellants, *v.* Board of River Port Pilot Commissioners for the Port of New Orleans, et al.	On Appeal from the Supreme Court of the State of Louisiana.

[March 31, 1947.]

Mr. Justice Rutledge, dissenting.

The unique history and conditions surrounding the activities of river port pilots, shortly recounted in the Court's opinion, justify a high degree of public regulation. But I do not think they can sustain a system of entailment for the occupation. If Louisiana were to provide by statute *in haec verba* that only members of John Smith's family would be eligible for the public calling of pilot, I have no doubt that the statute on its face would infringe the Fourteenth Amendment. And this would be true, even though John Smith and the members of his family had been pilots for generations. It would be true also if the right were expanded to include a number of designated families.

In final analysis this is, I think, the situation presented on this record. While the statutes applicable do not purport on their face to restrict the right to become a licensed pilot to members of the families of licensed pilots, the charge is that they have been so administered. And this charge not only is borne out by the record but is accepted by the Court as having been sustained.[1]

[1] The record shows that in a few instances over a course of several years nonrelatives of licensed pilots have received appointment as apprentices and qualified. But the general course of administration has been that such appointments are limited to relatives.

The result of the decision therefore is to approve as constitutional state regulation which makes admission to the ranks of pilots turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots. Whether the occupation is considered as having the status of "public officer" or of highly regulated private employment, it is beyond legislative power to make entrance to it turn upon such a criterion. The Amendment makes no exception from its prohibitions against state action on account of the fact that public rather than private employment is affected by the forbidden discriminations. That fact simply makes violation all the more clear where those discriminations are shown to exist.

It is not enough to avoid the Amendment's force that a familial system may have a tendency or, as the Court puts it, a direct relationship to the end of securing an efficient pilotage system. Classification based on the purpose to be accomplished may be said abstractly to be sound. But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power.

Conceivably the familial system would be the most effective possible scheme for training many kinds of artisans or public servants, sheerly from the viewpoint of securing the highest degree of skill and competence. Indeed, something very worth while largely disappeared from our national life when the once prevalent familial system of conducting manufacturing and mercantile enterprises went out and was replaced by the highly impersonal corporate system for doing business.

But that loss is not one to be repaired under our scheme by legislation framed or administered to perpetuate family monopolies of either private occupations or branches of the public service. It is precisely because the Amendment forbids enclosing those areas by legislative lines drawn on the basis of race, color, creed and the like, that, in cases like this, the possibly most efficient method of securing the highest development of skills cannot be established by law. Absent any such bar, the presence of such a tendency or direct relationship would be effective for sustaining the legislation. It cannot be effective to overcome the bar itself. The discrimination here is not shown to be consciously racial in character. But I am unable to differentiate in effects one founded on blood relationship.

The case therefore falls squarely within the ruling in *Yick Wo* v. *Hopkins*, 118 U. S. 356,[2] not only with relation to the line of discrimination employed, but also in the fact that unconstitutional administration of a statute otherwise valid on its face incurs the same condemnation as if the statute had incorporated the discrimination in terms. Appellants here are entitled, in my judgment, to the same relief as was afforded in the *Yick Wo* case.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this dissent.

[2] To like effect is *Alston* v. *School Board of Norfolk*, 112 F. 2d 992; cf. *Burt* v. *City of New York*, 156 F. 2d 791; Remedies for Discrimination by State and Local Administrative Bodies (1946) 60 Harv. L. Rev. 271.